

# MADHYA PRADESH HIGH COURT

Pyarelalsa

Vs.

Garanchanosa

Second Appeal No. 125 of 1963, Decided on 18.4.1963 from appellate decree of Dist.  
1, East Nimar, Khandwa  
(Shiv Dayal, J.)

16.02.1963. 18.04.1963

## JUDGMENT

**Shiv Dayal, J.**

1. This second appeal arises from a suit for ejectment of the tenant and for recovery of arrears of rent. The trial judge passed a decree for ejectment and also for Rs. 82.50 nP. on account of arrears of rent and manse profits at the rate of Rs. 2.50 nP. pendants lite and future. The tenant appealed from this decree but the appeal was dismissed. He has now come up to this Court in second appeal.

2. For the purposes of the limited question which I am called upon to answer, the facts are these. Pyarchandsa, Hiralalsa and Anokchandsa were three brothers. They were members of the joint Hindu family to which, the suit property belonged. Pyarchandsa had three sons Garanchandsa, Keshrichandsa and Babulal Garanchandsa is plaintiff 1, Kabulibai widow of Keshrichandsa plaintiff 2 and Jairanatl Bai, widow of Keshrichandsa, is plaintiff 3. There was a partition of the joint Hindu Family in samvat year 2011-12 (that is 1954-55). In this partition, the suit property was allotted to the three plaintiffs. Notice of ejectment, prior to the institution of the suit, was also given by these three plaintiffs. Defendant Pyarelalsa was the tenant of the joint Hindu Family which was carrying on business in the name and style of "Champalaisal Amarchandsa". The tenancy was created by virtue of a rent note dated November 9, 1941, (Ex. P-1). It was contended in, the plaint that after the partition the defendant became the tenant of the plaintiffs alone. This position was contested, by the tenant.

3. The only point urged before me by Sri Verma, learned counsel for the defendant-

appellant, is that there was no relationship of landlord and tenant between the plaintiffs and the defendant, and the other members of the Joint family were also his landlords so that the plaintiffs, without the other members joining them, were not entitled to determine the defendant's tenancy. Further, Section 109 of the Transfer of Property Act does not come into play inasmuch as a partition is not a transfer of the property. Shri Dabir, learned counsel for the respondents, objects to that question being raised in this Court when it was not raised in the first appellate Court. Since it is a question of law, I have allowed it to be raised.

4. It is true that in the strict sense of the term a partition is not a transfer of property; nor is it on exchange of property. Under the Hindu law every member of a joint family property belongs to every member of the Joint family and their shares are undefined so long as there is no severance of joint status. It follows as a necessary corollary that on partition, when a particular property is allotted to a particular member of the joint Hindu Family, it is not as if the property is transferred to him; he was already a proprietor of that property. The real change brought about by partition is that so far as that particular property is concerned, the other members cease to have any title or interest. But it cannot be said that there was no privity between the tenant and the plaintiffs to whom the suit property was allotted on partition.

5. Sri Verma relies on a number of decisions. In *Sonatan v. Sreenath*,<sup>1</sup> the question was considered in relation to the Bengal Money lenders Act, and the view taken is that in a partition there is no acquisition of property in another independent right; nor is it a conveyance; nor an exchange. In *Narasimhalu v. Someswara Rao*,<sup>2</sup> Patanjali Sastri, J., (as he then was), delivering the judgment of the Division Bench, pointed out the true nature of a partition under the Hindu law. It was observed :

"It is thus a renunciation of mutual rights and does not involve any transfer by one co-sharer of his interest in the properties to the others."

This proposition must be taken as the settled law. But this decision, in my opinion, does not help the appellant on the question with which I am dealing. In *Inder Pat Singh v. Sarnam Singh*,<sup>3</sup> the question was whether the guardian acted in excess of his authority because he entered into a compromise, when he had no power to transfer. It was held that a family arrangement was not a transfer. In *Radhakrishtnayya v. Sarasamma*,<sup>4</sup> it was held that for the purposes of Section 53-A of the Transfer of

Property Act, a partition, is not a transfer. In *Jatsu Pahan v. Ambikajit Prasad*,<sup>5</sup> partition was held not to be a transfer for the purposes of Section 10 of the Transfer of Property Act.

6. In *Mamad Kunhi v. Ibrayani Haji*,<sup>6</sup> the question was whether Section 36 of the Transfer of Property Act applied to a partition and it was answered in the negative. The last, case relied on by *Shri Verma is Ramesh v. Baliram*,<sup>7</sup> In that case the question was about the applicability of Article 18 of the Limitation Act. There, M exchanged a field belonging to him and his sons as a joint family property for another field on 9-3-1940. In a partition of the family property on 19-10-1949 between M and his sons, the field acquire in exchange was allotted to one of M's sons. On 20-2-1950, a co-occupant sued M for preemption. On 12-8-1950, he applied for making M's son to whom the field was allotted, a party to the suit. It was held that the suit was barred by time under Article 10 of the Limitation Act and that partition was only a change in the mode of enjoyment so that the provisions of Section 174(4) of the C.P. and Berar Land Revenue Code were net applicable, and that the plaintiff should have made M's sort a parts to the suit within one year.

7. In a word, these cases hold a partition not to be a transfer for the purposes of some of the provision of the Transfer of Property Act, which came for consideration. Learned counsel has, however, not been able to by his hands on a single decision which holds that a partition is not a transfer for the purpose of Section 109 of the Transfer of Property Act.

8. It is settled law so far as this Court is concerned that all the co-owners must join in giving notice of ejectment to the tenant. If one of the co-owners declines to join others in giving notice of ejectment, the only remedy is partition. The argument of Shri Verma is that even after the partition all the co-owners must join in giving notice. Now, that co-owner who declined to join in giving notice before the partition, can continue the same attitude and thereby defeat the purpose for which the partition was effected. This means that the tenant will never be ejected because of the veto by on of the co-owners. This cannot be the intention or policy of the law. The law must be interpreted in such a manned as to bring it in conformity with substantial justice. In the case of a transfer, for instance by sale, the transferee possesses all the rights of the lessor and those of the original lessor automatically cease to exist. By virtue of Section 109, the transferee becomes the landlord of the tenant. The same principle can be

applied to a case of partition because there also the rights of all the members of the joint family to whom the suit property once belonged cease to exist except of the member to whom it is allotted and who, therefore, becomes entitled to realise rent and eject the tenant. The principles of Section 109 of the Transfer of Property Act can, therefore, be extended to the case of partition.

9. A Full Bench of this Court, in *Vinayak v. Moreshwar*,<sup>8</sup> has held that a partition is a transfer for the purposes of Section 53-of the Transfer of Property Act and, at any rate, the principle of the section which is not exhaustive except as to the matters with which it deals is of wider application and applies to a partition. This decision extends the principle of Section 53 to a partition. I would, for the reasons stated above, extend the principle of Section 109 of the Transfer of Property Act also to a case of partition.

10. It is true that Section 5 of the Transfer of Property Act defines the term "transfer of property" as follows :

"In the following sections 'transfer of property' means 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 and one or more other living persons and 'to transfer property' is to perform such act.

In this section 'living person' includes a company or association or body of individuals, whether incorporated or not, but nothing herein contained shall affect any law for the time being in force relating to transfer of property to or by companies, associations or bodies of individuals. But this definition is not exhaustive and it does not cover all sorts of transfers of properties.

11. In *Indoji Jithaji v. Ramacharlu*,<sup>9</sup> Spencer, J., took the view that a partition merely effected a change in the mode of enjoyment of property and was not an act conveying property from one living person to another within, the meaning of Section 5 of the Transfer of Property Act. This view was reconsidered by a Division Bench of the same High Court in *Rasa Goundarr v. Arunachela Goundan*,<sup>10</sup> and the learned Judges of the Division Bench did not accept it. In the Division Bench case it is held that Section 53 of the Transfer of Property Act applies to a case of partition. In principle, I do not see any reason not to apply the same interpretation here.

12. In the view that I am taking, I am supported by the decision in *Banarsilal v.*

*Bhagwan, <sup>11</sup>*

13. The appeal is dismissed with costs.

Appeal dismissed.

Cases Referred.

1. AIR 1946 Cat 129
2. AIR 1948 Mad 505
3. AIR 1951 All 823
4. AIR 1951 Mad 213
5. AIR 1957 Pat 570
6. AIR 1959 Ker 208
7. 1957 Nag LJ 296.
8. ILR (1944) Nag 342: AIR 1944 Nag 44
9. AIR 1920 Mad 20
10. AIR 1923 Mad 577
11. AIR 1955 Raj 167