BOMBAY HIGH COURT

Arwindlal Bhukandas Shah

Vs.

Khandu Jaina Patil

Special Civil Application Nos. 104 to 105 of 1961 with Special Civil Application No. 3048 of 1958

(H.K. Chainani, C.J. and Chandrachud, J.)

16.06.1961

JUDGMENT

H.K. Chainani, C.J.

1. The petitioner in these four applications had made applications to the Mamlatdar for obtaining possession of the lands from his tenants, who are the first opponents in applications Nos. 104, 105 and 106 and first and second opponents in application No. 107. The petitioner was a member of a joint Hindu family, which owned about 420 acres. On December 20, 1956, a partition is said to have been effected. In that partition about 12 acres and 19 gunthas of land are said to have fallen to the share of the petitioner. The lands, which fell to his share, include the lands of which the opponents are the tenants. In the applications made to the Mamlatdar, the Mamlatdar ultimately passed orders directing that possession of half of the lands should be handed over to the petitioner. These orders were confirmed by the Deputy Collector. They were set aside by the Revenue Tribunal, which has remanded the matters to the Mamlatdar for fresh inquiry. The orders of remand are being challenged before us.

2. The Revenue Tribunal has in its judgment observed:-

> "By creating partition, it may be that a landlord may create an artificial necessity, which cannot be held to be a real or genuine necessity. If, therefore, a partition is made without such necessity, it will have to be presumed that it was made to oust the tenant and that there was no bona fide requirement. Partitions which are made with such object would also affect the question of the income of the lands being the principal source of income for the maintenance of the applicant. If, therefore, a partition is not bona fide and fails to prove the condition of the requirement for personal cultivation, the income of such lands cannot be said to be the income which would be the source of maintenance for the

> applicant landlord. .. .The burden lay on him to prove that the partition which has been effected does not affect the condition of bona fide requirement for personal cultivation."

The Revenue Tribunal, therefore, appears to have been of the view that in order that there may be a valid partition, there must be compelling circumstances, which make it necessary for the members of the family to separate from one another. This view is not correct. It is not necessary in law that any necessity for making a partition should exist. Since questions regarding partitions have arisen in many cases, both in applications made under Section 29 and under Section 88C of the Tenancy Act, we consider it necessary to state what the correct position in law is. In Hindu law partition means severance of joint status. It consists in denning the shares of the coparceners in the joint property and actual division of the property by metes and bounds is not necessary. Once the shares are defined, the partition is complete. The property ceases to be joint immediately the shares are defined and thenceforth the parties hold the properties as tenants-in-common, see Mulla's Hindu Law, 1959 ed. pp. 492-493. Every member of an undivided Hindu family has an indefeasible right to demand a partition of his own share and he may assert his right at any time he chooses. Partition does not give him a title or create a title in him; it only enables him to obtain what is his own in a definite and specific form. It is not necessary that any necessity should exist or that there should be any circumstances which compel him to ask for separation. He may ask for separation for any reason lie deems proper. But whatever be the reasons, on account of which he wants severance, his right to obtain and possess the share, to which he is entitled, cannot be denied. The other members of the family must submit to it, whether they like it or not.

> "...neither the co-sharers can question it, nor can the Court examine his conscience to find out whether his reasons for separation were well founded or sufficient; the Court has simply to give effect to his right to have his share allocated separately from the others. *Girja Bai v. Sadashiv Dhundiraj*[1]

The motive or the reasons, on account of which partition is effected, have, therefore, no bearing on its validity.

3. It is also not necessary that there should be a document in writing. All that is necessary is that there should be a clear and definite indication of an intention to effect severance of the joint status. A declaration of such an intention amounts to a valid separation, though it is not perfected by an actual division of the estate by metes and bounds. If there is a written document, that will ordinarily be sufficient and strong evidence of partition and the subsequent acts of parties will not control its legal effect. The burden will then lie on the person, who alleges that the family still continued to be joint, to prove that fact. A partition may also be partial, either in respect of persons making it or in respect of property and it is not necessary for a valid partition that all properties should be divided.

4. The Tenancy Act does not take away or restrict the right given by law to members of an

undivided Hindu family to effect a partition. Sub-section (2) of Section 31 specifies March 31, 1957, as the last date, before which a landlord, who wants possession of his land either for personal cultivation or for any non-agricultural purpose, must make an application to the Mamlatdar. Sub-section (3) extends this date in cases in which the landlord is a minor, a widow or a person subject to mental or physical disability, or a serving member of the armed forces. The proviso to this sub-section states that this sub-section shall not apply, if a person of such category is a member of a joint family, unless the share of such person in the joint family has been separated by metes and bounds before March 31, 1958, and unless such person has got his proper share and not a larger one in the entire joint family property. Similar provisions have been made in the proviso

[1](1916) L.R. 43 I.A. 151, at p. 161, S.C. 18 Bom. L.R. 621

to Clause (a) in sub Section (1) of Section 32F and in the proviso in Sub-section (4) of Section 33A recently added to the Act. By these provisions the Legislature has, therefore, conferred benefits on persons, falling in the above categories, in whose cases partition had been made before March 31, 1958. It is, therefore, clear that the Legislature intended that partition should have its ordinary legal effect even for purposes of the Tenancy Act.

5. Section 31 also gives a last chance to the landlords to obtain possession of their lands on the ground that they require them for personal cultivation or for non-agricultural purposes. As except in the special cases referred to in Sub-section (3) of Section 31, this right could not be exercised after March 31, 1957, a partition cannot be said to be not bona fide or made in order to evade the provisions of the Tenancy Act, merely because it was made after August 1, 1956, when the amendments made in the Act in 1956 came into force or because it was made shortly before notices were given under Sub-section (1) of Section 31 to the tenants terminating their tenancies, There would, however, be evasion of the provisions of the Tenancy Act, if only a show of parti ion is made, that is, if a partition is alleged when in fact it has not taken place. Consequently, in any case in which the tenant disputes the factum of partition, it will be necessary for the Tenancy Court to inquire into the matter and determine whether the partition was genuine and whether the members of the landlord's family had really separated or whether it was only a sham transaction which had not been acted upon and whether the members of the family still continued to be joint. This will ordinarily be the scope of the inquiry in an application made under Section 29 read with Section 31, in which the landlord relies on a partition. As pointed out above, a Court including a Tenancy Court, is not concerned with the reasons on account of which partition is effected. It is, therefore, not necessary for the landlord to prove that the partition was made bona fide. .All that is necessary for the Tenancy Court to find is whether the partition had really taken place.

6. Mr. Merchant has contended that a Tenancy Court is not competent to inquire into the question whether the partition was genuine. This question according to him can only be agitated in a civil Court. There is no substance in this argument. In an application made under Section 29 read with Section 31, it is necessary for the Tenancy Court to determine in cases of dispute whether the applicant is the landlord of the land, of which he is claiming possession and also whether the

income from that land will be the principal source of his maintenance. For the purpose of determining these questions, it will be necessary for the Court to decide whether the partition had really been effected, for if notwithstanding the alleged partition, the family still continued to be joint, the joint family will be the owner of the land and. the income of the joint family and not of the applicant will have to be considered for the purpose of ascertaining whether the income from the land would be the principal source of maintenance of the landlord. A Tenancy Court must, therefore, inquire into the question and decide whether there had in fact been a partition, if the tenant raises a dispute about it.

7. Our attention has been invited to the following observations made in my judgment in *Jankibai Ramchandra Lagoo v. Namu Motiram Goye*[2] decided by Chainani C.J. and V.S. Desai, J., on September 4, 1959 (Unrep.).

[2](1959) Special Civil Application No. 3048 of 1958

> "... If a partition is made only in order to enable the landlord to obtain possession of his land from the tenant, it might in certain cases reflect on his bona fides."

These observations must be read along with the earlier passage in the same judgment, in which it was pointed out that the

> "...Tenancy Act does not prevent members of a joint Hindu family from effecting a partition at any time they choose to do so."

It is also clear from the words "it might in certain cases reflect on his bona fides" that what we intended to convey was that in some cases, the fact that the partition had been made with the sole object of enabling the members of the joint family to obtain possession of their lands from their tenants, might justify an inference that the requirement of the landlord was not bona fide. The above observations cannot, therefore, be relied upon in support of the argument that in every such case the finding on the question of bona fides should be against the landlord. The question of bona fides must be decided in each case having regard to the circumstances of that case, one of which may be the manner in which partition is effected. If it is made in an unusual manner, it may have a bearing on the question of bona fides. For instance, if all the properties yielding substantial income, such as the lands in personal cultivation of the family, are allotted to one coparcener A and only the lands in possession of tenants to another coparcener B, so as to enable B to contend that it is necessary for him to have additional income, it may be possible to hold that B is not in real need of any addition to his income and that consequently the demand for the lands in possession of the tenants is not bona fide.

8. So far as the present case is concerned, the partition deed was executed on December 20, 1956. The joint family owned about 420 acres, out of which only about 12 1/2 acres were allotted to the petitioner. The tenants have contended that the partition was fictitious. Neither the Mamlatdar nor the Deputy Collector has recorded a clear finding on this question, whether the partition was genuine or fictitious. The matters must, therefore, go back for the purpose of this

question being decided.

9. We, therefore, confirm the orders made by the Revenue Tribunal remanding the applications made by the petitioner to the Mamlatdar, but direct that these applications should be disposed of in the light of the observations contained in this judgment.

10. The rule in each application is, therefore, discharged. No orders as to costs.
Rule discharged.