BOMBAY HIGH COURT

Dhondi Vithoba Kolz

Vs.

Mahadeo Dagdu Koli

A.F.A.D. No. 491 of 1965, Appeal No. 373 of 1963.

(Malvankar, J.)

18.04.1972

JUDGMENT

Malvankar, J.

1. The dispute in this appeal relates to the land Survey No. 163/1 admeasuring 13 acres assessed at Rs. 11-10-0 situate in the village of Degaon in North Sholapur Taluka of Sholapur District. The land was originally Shet Sanadi Inam granted to the ancestor of the parties for rendering service as Kotwal of the village. Admittedly, succession to the land was governed by the rule of primogeniture and it was also impartible. It is also common ground that this was the only land belonging to the family of the parties.

2. One Vithoba was the propositus. He died long back leaving behind him three sons Dagdu. Dhondi and Damu, Dagdu died on 3rd March, 1961 leaving behind him his widow Muktabai, defendant No. 6, and five sons viz. defendants Nos. 1 to 5, Defendant No. 5 died pending the suit. Dhondi is the plaintiff. Damu also died some time back leaving behind him his widow Parvati, defendant No. 8 and his son Hanmantu, defendant No. 7. The Watan was abolished under the Bombay Inferior Village Watans Abolition Act, 1958. (hereinafter called "the Act"), which came into force on 20th January, 1959 before Dagdu died on 3rd March, 1961. Admittedly. Dagdu was the eldest male member of the eldest branch of the family and the land stood in his name. Further, it is not disputed in this appeal that till about the year 1954-55 the family of the three brothers was joint and Dagdu was the Karta of the family. In 1954-55, there was a partition in the family and at that time the only property which could be partitioned being the ancestral house, the same was partitioned between the brothers. The land in dispute being Watan land was impartible and obviously, therefore, it could not be the subject-matter of the partition at that time. However, after the abolition of the Watan under the Act, the plaintiff Dhondi filed the suit, out of which this appeal arises, for partition and possession of his share in the land alleging that the land being the joint family property before and after the abolition of the

Watan and the same having become partible after the abolition of the Watan, he was entitled to 1/3rd share in it. He also alleged in the plaint that though the land continued in the name of Dagdu. he held it as a manager of the joint Hindu family of the brothers. He, therefore, prayed for a decree for possession of his 1/3rd share by equitable partition by metes and bounds and also for mesne profits.

3. The defence was that the land being Watan land and therefore impartible before the abolition of the Watan and the same being granted to Dagdu on his paying occupancy price it was the self-acquired property of Dagdu and, therefore, the plaintiff was not entitled to any share in it.

4. The trial Court held that Watan being abolished, the land became partible and, therefore, the plaintiff was entitled to l/3rd share in it. The learned trial Judge, therefore decreed the suit for possession of the plaintiff's l/3rd share with mesne profits. Defendants Nos. 1 to 4 and 6 then went in appeal to the District Court in Civil Appeal No. 373 of 1963. The learned appellate Judge took the view that the land, after it was regranted to Dagdu, could not continue to be the joint family property and, therefore, the plaintiff had no share in it. According to him, the suit was not therefore maintainable. Hence he allowed the appeal, set aside the decree passed by the trial Court and dismissed the suit with costs. Being aggrieved by this judgment and decree, the plaintiff has come to this Court in second appeal.

5. The first question that is agitated before me by the learned counsel Mr. Jahagirdar, appearing on behalf of the appellant-plaintiff, is whether the land being originally the joint family land, the plaintiff could claim any share in it even after the abolition of the Watan under the Act and resumption and regrant of the same to Dagdu, his brother. It is not disputed before me that before 1954-55 when there was a severance of status amongst the brothers and their ancestral house was partitioned between them, the family was a joint family and the land was the joint family property, though it was a Watan land, succession to which was governed by the rule of primogeniture, and the land was also impartible. Impartible property is joint family property, But two out of the three principal incidences of the joint family property cannot be enforced in respect of such property. The incidence of partition is inconsistent with the tenure of the property being impartible and cannot be enforced. Similarly, the incidence of joint enjoyment cannot be enforced, because the property devolves upon the eldest member of the eldest line by reason of the rule of primogeniture by which it devolves, But the property still 'remains to be a joint family property. The right to take property by survivorship subject to the incidence that it devolves upon the eldest member of the eldest line is still enforceable. Once the tenure of the property is altered the right to claim partition and the right to claim enjoyment would become enforceable as if they were in suspense during the time that the property by tenure was impartible and devolved by primogeniture. (Vide *Sm. Sanja Bandaji v. M/s. Ahmedabad Jaybharat Cotton Mills Ltd*[1]*.,*). It is, therefore, clear that the land was the joint family land belonging to the three brothers till the abolition of the Watan on 20th January, 1959 with this difference that till 1954-55 when the severance of status took place between the brothers, it was joint family property held by the joint family, and after the severance of status the land was held by the three brothers as tenants-in-

common. Nevertheless, it continued to be the joint family land with each of the three brothers having l/3rd share in it. On the date of the coming into force of the Act, that is to say on 20th January, 1959, the land was a joint family land in which each brother had a specified share viz. l/3rd.

6. The question, however, is whether this character of the land changed after the Watan was abolished and the land was resumed under Section 4 of the Act and regranted to

[1] AIR 1956 Bom 612

Dagdu on payment of occupancy price under Section 5 of the Act. It is common ground that the occupancy price was paid by Dagdu. It is contended on behalf of the defendants that because the regrant was to Dagdu on payment of occupancy price by him alone, it was his self-acquired property, while the contention of the plaintiff is that even after the resumption of the land on abolition of the Watan and its regrant in the name of Dagdu, it did not shed its character as joint family land held fey the three brothers as tenants-in-common. The question, therefore, for consideration is whether after the abolition of the Watan, resumption and regrant of the land to the Watandar of the Watan take away the character of the land as a joint family land and the land becomes the self-acquired property of the Watandargrantee.

7. I have already pointed out that on the date of the abolition of the Watan the land was joint family land held by the three brothers in specified shares as tenants-in-common. Obviously, therefore. Dagdu, the eldest brother, who was in possession of the land, was holding it not only for himself but also for and on behalf of his brother, the present plaintiff, and the branch of his third brother Damu. If that is so, the question is whether there is anything in the Act which extinguishes the interest of the two brothers which they had as tenants in common because the land was originally a joint family land, after the land was resumed under Section 4 of the Act and was regranted to Dagdu under Section 5 of the Act. Section 4 which provides for abolition of inferior village Watans together with incidents thereof reads thus :-

> "4. Notwithstanding anything in any usage, custom, settlement, grant, agreement, sanad, or in any decree or order of a Court or in the existing Watan law with effect on and from the appointed date.
>
> (1) all inferior village Watans shall be and are hereby abolished,
>
> (2) all incidents (including the right to hold office and watan property, the right to levy customary fees or perquisites in money or in kind, and the liability to render service) appertaining to the said watens shall be and are hereby extinguished,
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> (3) subject to the provisions of Sections 5, 6 and 9 all watan land shall be and is hereby resumed and shall be subject to the payment of Land revenue under the provisions of the Code and the rules made thereunder as if it were an unalienated land :
>
> Provided that such resumption shall not affect the validity of any alienation of such watan land made in accordance with the provisions of the existing watan law or the rights of an alienee thereof or any person claiming under or through him."

It, therefore, says that what is abolished is Watan and all the incidents appertaining to such Watan notwithstanding anything in any usage, custom, settlement, grant, agreement sanad, or in any decree or order of a Court or in the existing Watan law. "Inferior Village Watan" is defined under Section 2 (1) (vii) meaning the inferior village hereditary office together with the tenure of watan property, if any, and the rights, privileges and liabilities attached thereto, while "Watan property" as defined in Section 2 (1) (xiii) means the moveable or immoveable property held, acquired or assigned under the existing law for providing remuneration for the performance of the duty appertaining to an inferior village hereditary office and includes a right under the existing Watan law to levy customary fees or perquisites in money or in kind whether at fixed times or otherwise and also includes cash payments in addition to the original Watan property made voluntarily by tine State Government and subject periodically to modification or withdrawal. It seems to me, therefore, that what Section 4, sub-sections (1) and (2) seek to abolish and extinguish is the inferior village hereditary office together with the tenure of watan property held, acquired or assigned under the Watan law for providing remuneration for the performance of the duty appertaining to an inferior village hereditary office and all the incidents thereto including the right to hold office or to levy customary fees or perquisites in money or in kind and the liability to render service. It does not affect the ordinary incidence of the property under personal law. In other words, if such property is joint family property or the property held by tenants-in-common, its incidences are not extinguished by the abolition of the Watan and extinction of its incidents.

8. It is, however, argued that sub-section (3) of Section 4 provides for (resumption of the land arid inasmuch as on resumption the land vests in the Government, it extinguishes every interest which any person may claim either as a member of a joint family or as a tenant-in-common. In the first place, the Act nowhere provides that the land on resumption shall vest in the Government free of any interest in favour of any person- It is true that sub-section (3) of Section 4 says that all Watan land shall be and is resumed, but this resumption is subject to the provisions of Sections 5, 6 and 9 of the Act, Moreover, proviso to sub-section (3) also saves the rights of alienees and persons claiming through them, provided of course the alienation is made in accordance with the existing Watan law. Now, Section 5, with which we are concerned in this appeal, provides that a Watan land resumed under Section 4, in oases not falling under Sections 6 and 9, shall be regranted to the Watandar of the Watan to which it appertained on payment by or on behalf of the Watandar to the State Government of the occupancy price equal to three times the amount of full assessment of such land within the prescribed period and in the prescribed manner, in which case the Watandar shall be deemed to be an occupant within the meaning of the Bombay Land Revenue Code. It is, therefore, obvious that under Section 4 (3) the Watan land is to be resumed, subject to the condition that if the Watandar of the Watan pays occupancy price within a prescribed period and in a prescribed manner, then he is to be the occupant of the land from 20th January, 1959, the date on which the Watan is abolished. The effect of sub-section (3) of Section 4 read with Section 5, therefore, is that the Watandar who held the land as Watan land subject to the rule of primogeniture and impartibility till 20th January, 1959, would be holding the land as an occupant under ordinary law. All, therefore that the Act does is that it effects a

change in the tenure or the character of holding as Watan land, but it does not affect the other incidents of the property according to personal law. In other words, the property continues to be the joint family property or the property held by the tenants-in-common, as the case may be. This resumption of the Watan land, as I have already indicated, is also subject to the provisions of Section 6 of the Act which provides for regrant of Watan land to authorised holders. "Authorised holder" is denned in Section 2 (1) (ii) meaning a person in whom vests the ownership of a Watan land which has been validly alienated permanently by the Watandar whether by sale or gift or otherwise, under the existing Watan law. Now, Section 6 says that if any Watan land held by such an authorised holder is resumed under Section 4 of the Act, it shall be regranted to the authorised holder on payment of occupancy price mentioned in Section 5 of the Act, and all the provisions of Section 5 shall apply in relation to such regrant Here again, though a Watan land held by an authorised holder is resumed under Section 4 of the Act on abolition of the Watan, the interest which became vested in the authorised holder on account of valid and permanent alienation made by the Watandar continues, inasmuch as Section 6 requires that such a land shall be regranted to the authorised holder on payment of occupancy price as provided for by Section 5 of the Act Section 6 also, therefore, does not effect any change in the rights which the authorized holder had on the date of the abolition of the Waban and resumption of the land. Coming to Section 9, subject to which also Watan is to be resumed under Section 4 (3) of the Act, that section provides for the summary eviction of unauthorized holders and regrant of the Watan land to them in certain circumstances. This section provides that if the State Government is of opinion that in view of the investment made by such an unauthorized holder in the development of the land or in the non-agricultural use of the land or otherwise, the eviction of such holder from the land will involve undue hardship to him, the Government can direct the Collector to regrant the land to such a holder also on payment of such amount and subject to such terms and conditions as the State Government may determine and the Collector shall regrant the land accordingly to such holder also. Now, Section 2 (1) (x) defines "unauthorized holder". The expression means a person in possession session of a Watan land without any right or under a lease, mortgage, sale, gift or any other kind of alienation thereof which is null and void under the existing Watan law. But even in such a case. Section 9 says that if the Government is satisfied, the Collector shall regrant the land to such an unauthorized holder also subject to such terms and conditions as the Government may determine. But it is material to note here that Section 5 of the Act does not apply to such cases, with the result that an unauthorized holder who is in wrongful possession of the Watan land would become a lawful holder thereof only from the date on which the Government regrants it to him on certain terms and conditions, and not from the date of the abolition of the Watan and the resumption of the land, unless of course the terms and conditions on which the land is regranted provide that the regrant would take effect from that date. The examination, therefore, of Sections 4, 5, 6 and 9 of the Act, reveals that even though the Watan is abolished and its incidents are extinguished under the Act and the lands are resumed under Section 4 of the Act, the Act maintains the continuity of the interest in the lands of the persons before and after the coming into force of the Act. provided of course the holder pays occupancy price. What the Act does is only to effect a change in the nature of the tenure or in the nature of

the holding in that before the abolition of the Watan the land was being held by the Watandar in consideration of rendering service and non-payment of assessment, but after the abolition of the Watan and its incidents he holds It in consideration of the payment of occupancy price and the land revenue. It does not effect any other change in any other rights of the holders in such lands. If this view is correct, then in the instant case even after the abolition of the Watan and resumption and regrant of the land to Dagdu, it continued to be the joint family land held by the three brothers as tenants-in-common in specified shares viz. 1/3rd each, and therefore the plaintiff would be entitled to 1/3rd share in it.

9. In this connection, my attention is drawn to certain unreported decisions of this Court. The first is *Tukaram v. Ramrao*[6], In that case, the lands were Huzur Sanadi lands and they had ceased to be so and become Rayatawa lands long before the Act came into force. The Huzur Sanadi lands were governed by the Bombay Merged Territories Miscellaneous Alienations Abolition Act (Act No. XXII at 1955). But the lands having become Rayatawa lands long before that Act came into force, the learned Judge had no occasion to consider the effect of the provisions of that Act. Even then the learned Judge who

[6] Second Appeal No. 497 of 1955 decided on 17-09-1957 (Bom)

decided the case has observed thus in his judgment :-

> "In view of this conclusion. I need not consider in detail the effect of the provisions of the Bombay Merged Territories Miscellaneous Alienations Abolition Act (Act No. XXII of 1955) on these lands. This Act came into force on the 1st of August, 1955 and the effect of this Act on these lands, supposing these lands continued to be Huzur Sanadi lands till the 1st of August, 1955, would be that the Inam would stand abolished as from that date. In that case these lands would be partible amongst the plaintiff and the defendants, if the original grant consisted of a grant of a share in the land revenue. If, on the other hand, the original grant consisted of a grant of the lands themselves, then the lands would be partible between the plaintiff and the defendants, provided the permission of a competent authority for the partition of the lands was obtained."

Relying on these observations, the learned counsel Mr. Jahagirdar has argued that the provisions of the Bombay Merged Territories Miscellaneous Alienations Abolition Act, 1955, being similar to the provisions of the Act under our consideration, the observations made by the learned Judge in the aforesaid case apply to the present case also. It seems to me that though the question raised before me in this appeal was not raised in that decision under the Bombay Merged Territories Miscellaneous Alienations Abolition Act, 1955, still the observations made by the learned Judge definitely show that even after the abolition of the Huzur Sanadi Inams the learned Judge was of the opinion that the lands belonging to the joint family continued to be the joint family lands and were liable to be partitioned, even though after the abolition of such Watans the lands were resumed and regranted under that Act The observations of the learned Judge, therefore, do help the present appellant-plaintiff to some extent on the point under consideration.

10. The next decision to which my attention is drawn by the learned counsel, is the decision of a Division Bench of this Court in *Dattajirao v. Abasaheb*[7] That was also a case under the Bombay Merged Territories Miscellaneous Alienations Abolition Act, 1955. The suit was for a partition and on the date of the suit the family was joint, and this Court has observed thus in the judgment :-

> "Presumably as no action has been taken, it must necessarily be that the occupancy price has been paid and the land has been granted to the family. Since the family continued to be joint and the defendants were in possession on behalf of the family, the benefit must enure to the whole family." These observations also show that in that case though on abolition of the Inam the lands were resumed and regranted the regrant to one of the members of the family was taken to be the regrant to the family, inasmuch as the family continued to be joint till the date of the suit. In the instant case, before the Watan was abolished, as I have already pointed out, there was a severance of status, with the result that on the date of the abolition of the Watan, the land which was a joint family land before, was held by the brothers as tenants-in-common, and Dagdu who was in actual possession was, therefore, holding it for and on behalf of himself and the two brothers also. That being so, the grant to Dagdu on payment of occupancy price was also the grant to all the three brothers. It seems to me, therefore, that this decision also helps the

[7]First Appeals Nos. 367 and 490 of 1957 decided on 03-04-1963 (Bom)

> plaintiff appellant.

11. I am, therefore, of the opinion that the land in dispute, which was held by the three brothers as tenantsin-common and which was in actual possession of Dagdu for and on behalf of himself and the two brothers, continues to be such land even after the Watan was abolished and the land was resumed and regranted to Dagdu, the eldest brother, and, therefore, though Dagdu himself paid the occupancy price, he did so for and on behalf of all the three brothers, and therefore the plaintiff is entitled to the l/3rd share in the land.

12. Then the next question that is agitated before me by the learned counsel Mr. Gole, appearing on behalf of the respondents-defendants, is that the suit for partition of the land by metes and bounds is not maintainable for want of sanction of the Collector under sub-section (3) of Section 5 of the Act. Sub-section (3) of Section 5 says that the occupancy of the land regranted under sub-section (1) shall not be transferable or partible by metes and bounds without the previous sanction of the Collector and except on payment of such amount as the State Government may by general or special order determine. Relying on this provision, the learned counsel argues that inasmuch as the previous sanction is necessary under this provision before the land can be partitioned by metes and bounds, in the absence of such permission of the Collector which is admittedly not forthcoming in this case, the suit is not maintainable. I cannot agree. All that subsection (3) of Section 5 says is that the land shall not be partible by metes and bounds without

the previous sanction of the Collector. The section does not say that no suit shall be instituted for partition of a land by metes and bounds without the previous sanction of the Collector. Necessarily therefore, if a party files a suit for partition of land and the Court passes a decree, the actual division of the land by metes and bounds cannot be made, unless the party obtains previous sanction of the Collector for such partition by metes and bounds. The question of partition by metes and bounds would obviously arise only in execution proceedings after the decree for partition is passed by the Court If, therefore, after a decree for partition of such land is passed by the Court, the Court directs that the plaintiff shall obtain possession of his share in the land by metes and bounds, provided he obtains the necessary sanction from the Collector before the land is partitioned by metes and bounds I do not think that there would be any contravention of the provisions of sub-section (3) of Section 5. The learned counsel Mr. Gole has, however, argued that ultimately if the Collector refuses to give the sanction, the decree passed by the Court would not be executable. In other words, the Court would not be able to execute the decree for want of sanction of the Collector and thus the Collector would be in position to defeat the very purpose of the decree by refusing to sanction partition by metes and bounds. I cannot agree. In view of the statutory provisions contained in sub-section (3) of Section 5 of the Act, the Court itself would pass a decree subject to these provisions, in which case the Court would be granting the relief of partition, of such land by metes and bounds only subject to the previous sanction of the ; Collector. If that is so there is no question of the decree being rendered inexecutable or its execution being left to the discretion of the Collector. A similar question arose in *Jaysingrao v. Smt. Premavati Raje*[8]*..)*, in which the Division Bench of this Court which decided these appeals has observed thus :

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> "It is also not possible to agree with, the learned Judge that because the lands are

[8] First Appeal Nos. 200 and 299 of 1961 decided on 20-11-1968 (Bom)

> impartible without the sanction of the Collector and except on payment of the appropriate amount for the same, the plaintiff should be given only a declaration. This Court had an occasion to deal with a similar restriction in execution proceedings in *Tukaram Zipru v. Baban Dhondu*[9]*,* which related to a similar restriction in Bombay Pargana and Kulkarni Watans (Abolition) Act of 1950. This Court observed 'A decree-holder during execution proceedings can, however, on behalf of the Court obtain sanction for sale of the land from the Collector under Section 4 (2) of the Act.' In the present case, defendant No. 1 who is in possession of the estate is bound to apply for permission to the Collector for having the property divided amongst the heirs. If he does not do so, the Court is entitled either to authorise the plaintiff to make such an application or appoint a Commissioner for effectively complying with law. If for this purpose any amount has to be paid, it would be part of the expenses for administration of the estate and the amount must be paid out of the estate. The Court, therefore, is not helpless in the matter of granting relief to the plaintiff."

I respectfully agree with the observations of this Court in the aforesaid decision. I, therefore, do

not see any substance in this contention.

13. Lastly, the learned counsel has argued that at any rate the plaintiff in this case would not be entitled to mesne profits from the date of the institution of the suit in accordance with Order 20, Rule 12 (1) (c) of the Civil Procedure Code, but he would be entitled to mesne profits only from the date of the sanction of the Collector for partition of the land by metes and bounds, In other words, the argument is that the possession of defendant No. 1 in this case would become wrongful only from the date on which the Collector gives the necessary sanction. I cannot agree. In my opinion, if ultimately in such a case the Collector grants the necessary sanction, such a sanction would obviously relate back to the date of the institution of the suit. Under normal rule, when a decree adjudicates upon the rights between the parties, such an adjudication relates to the date of the institution of the suit, and if the Collector gives sanction to partition any such land by metes and bounds, impediment in the way of actual division by metes and bounds being removed, the adjudication would relate back to the date of the institution of the suit. If, however, the Collector refuses to give sanction for any reason, there would be no partition by metes and bounds. Nevertheless, the plaintiff would be entitled to receive the profits of the land in respect of his share in it. Where a suit is for recovery of possession and mesne profits the Court is empowered under Order 20. Rule 12 of the Civil Procedure Code to pass a decree for possession of the property and mesne profits from the date of the institution of the suit until the delivery of possession to the decree-holder or the relinquishment of possession by the judgment-debtor or the expiration of three years from the date of the decree, whichever event first occurs. In a suit for partition and mesne profits, therefore, if the plaintiff obtains a decree, he becomes entitled to the mesne profits under Order 20 Rule 12, Civil Procedure Code. What Section 5 (3) of the Act provides is that if the partition is to be effected by metes and bounds, then only the previous sanction should be obtained from the Collector. Once that sanction is granted, the impediment in the way of the plaintiff in obtaining the partition by metes and bounds is removed, with the result that he becomes entitled to the mesne profits under Order 20, Rule 12, Civil Procedure Code. In my opinion, therefore, if ultimately the Collector gives sanction to

[9](1965) 67 Bom LR 908

partition this land by metes and bounds, the plaintiff would be entitled to mesne profits from the date of the institution of the suit as claimed here till the date of the occurrence of one of the three events mentioned in Order 20, Rule 12 (1) (c), Civil Procedure Code, whichever event first occurs. I, therefore, do not see any substance in this argument either.

14. The result, therefore, is that the appeal succeeds and the decree passed by the lower appellate Court dismissing the suit is hereby set aside and the following decree is passed instead :-

15. It is hereby declared that the plaintiff, defendants Nos. 1 to 6 together, and defendants Nos. 7 and 8 together, are each entitled to 1/3rd share in the suit land.

16. The plaintiff do obtain possession of his l/3rd share by equitable partition by metes and

bounds, provided the necessary sanction is obtained from the Collector under Section 5 (3) of the Act before the land is actually partitioned by metes and bounds. Defendants Nos. 1 to 6 together and defendants Nos. 7 and 8 together each also would be entitled to obtain possession of their 1/3rd share in the suit land by equitable partition by metes and bounds on payment of the necessary Court-fee stamp, provided they obtain the necessary previous sanction from the Collector under Section 5 (3) of the Act.

17. The partition is to be effected by the Collector or by a Gazetted subordinate of his appointed by him for the purpose.

18. Enquiry as to future mesne profits is directed against the defendants in possession under Order 20. Rule 12 (1) (c) of the Civil Procedure Code.

19. Defendants Nos. 1 to 4 and 6, respondents Nos. 1 to 5 do pay the costs of the suit throughout including the costs in this Court to the plaintiff-appellant and bear their own costs. The rest of the defendants-respondents do bear their own costs throughout.
Appeal allowed.