BOMBAY HIGH COURT

Laxmibai

Vs.

Ganesh

A.F.O.D. No.372 of 1968

(Kantawala, C.J., Tulzapurkar and Kania, JJ.)

08.04.1976

JUDGEMENT

Kantawala, C.J.

1. The Division Bench consisting of Deshmukh and Sapre, JJ. by its judgment and order dated 14th/15th July 1975 has referred the following question for determination by the Full Bench:-

> "When an alienation like the service inam in this case was a grant to a family in the name of senior member and the same is abolished, whether the provisions of Section 4 of the Bombay Merged Territories Miscellaneous Alienations Abolition Act, 1955, extinguish the ordinary rights and incidents in respect of such alienation under the personal law of the parties?"

2. The dispute in this appeal relates to lands pertaining to service inam. Originally the grant was to one Gangadhar and after his death an heirship enquiry was started in the year 1889. As a result thereof, the name of Narhari, his son, was entered as Navawala in respect of service inam by an order dated May 10, 1889. The genealogy of Narhar Gangadhar is as under:-

> After the death of Narhari in the year 1919 the proceedings initiated at the instance of the Chief Saheb of Ichalkaranji showed that he was dissatisfied with the services rendered by the existing members of Date family i.e. Narahari's and Gangadhar's family. It was also found that there was no able person in the family who could render service. In view thereof the inam was resumed and the lands were cultivated through the State. On or about Jan. 5, 1928, Sadashiv the eldest son of Narhari, made an application to the Chief Sahab that the inam may be revived and services may be accepted from Date family. Sadashiv himself was unable to render service and offered that his younger brother Balkrishna was able and competent as well as willing to render such service. After

reviving the Vatan in the name of Sadashiv the services of Balkrishna were accepted. Balkrishna also gave a writing to the effect that he was willing to render service on behalf of his brother. This arrangement continued till 1943 when the rendering of services was cancelled. Thereafter it was not necessary to render such service. There were two pieces of land pertaining to this inam, one being survey No.28/1, situate at Ichalkaranji and the other being survey No.661/5 situate at village Lat. As Balkrishna was put into possession of these lands upon revival of Vatan, his possession continued till the Bombay Merged Territories Miscellaneous Alienations Abolition Act, 1955 (hereinafter referred to as "the Act") was passed whereby alienation was abolished altogether. Balkrishna died in the year 1952 and after his death the two inam lands continued to be in possession of his heirs who are defendants Nos.1 to 5. The plaintiffs who are the sons and grand-sons of Shankarrao, one of the sons of Narhari filed a suit for partition and possession of their one-fourth share in the two inam lands and for past and future mesne profits. They pointed out that orders were already passed in respect of regrant of one of the pieces of land, namely, survey No.28/1 from Ichalkaranji and the regrant in the case of survey No.661/5 of village Lat was kept pending by the Revenue Authorities as the disputes raised by defendants Nos.9 to 11 were pending. The plaintiffs alleged that upon payment of occupancy price on behalf of the family during the time stipulated in the Act Government was bound to regrant the land and these two survey numbers were treated as family lands. According to the plaintiffs the four branches of Date family representing the four sons of Narhari were each entitled to one-fourth share in these two survey numbers. The plaintiffs accordingly asked for a declaration of their one-fourth share in these two lands which were then in possession of Balkrishna's heirs, the defendants Nos.1 to 5, and they sought a direction of the Court to effect a partition and for delivery of possession of their one-fourth share therein, Defendants Nos.6 to 8 who represented the branch of Madhav the youngest son of Narhari admitted the claim of the plaintiffs and were agreeable to a decree being passed. Defendants Nos.1 to 5 representing the branch of Balkrishna, the third son of Narhari contended that in the year 1928 when the inam was revived it was a grant in favour of Balkrishna alone and both the pieces of land represented the personal acquisition of Balkrishna. After the abolition of the inam under the Act both the pieces of land became the private property of Balkrishna's branch and defendants Nos.1 to 5 were solely entitled to the said two pieces of land as they alone paid the occupancy price in respect thereof.

3. The plea of defendants Nos.9 to 11 who represented the branch of Sadashiv the eldest son of Narhari, was that in the year 1928 the inam was revived in the name of Sadashiv alone; that it was personal grant to Sadashiv; that while Sadashiv was the holder of the inam the Act came into force and the alienation was abolished; that Sadashiv was alive at the time when the Act came into force and that having regard to the provisions of Section 7 of the Act Sadashiv alone was entitled to the regrant of these two pieces of land.

4. The trial Court took the view that the inam in respect of these two pieces of land was a service inam in favour of Date family; that it came down from generation to generation and the last holder thereof was Sadashiv in whose name the inam was revived by the then Chief Saheb of Ichalkaranji. According to the trial Court the revival of the inam in the name of Sadashiv was a grant to Date family as such and not individual to Sadashiv; that such grants of service inam constituted impartible estate with consequential rights of succession by the rule of primogeniture; that in respect of such grant the junior members of the family who otherwise formed a coparcenary had only right of succession to the property by survivorship if and when an appropriate occasion arose. As a result of the regrant under Section 7 of the Act the property became the private property of the entire Date family. Thus the trial Court rejected the contentions of the members of the branches of Balkrishna as well as Sadashiv and gave a declaration that each of the four branches was entitled to a one-fourth share therein and partition should be effected by the Collector in the normal manner.

5. An appeal was preferred by the defendants Nos.9 to 11 who are the heirs of Sadashiv. This appeal came up for hearing before the Division Bench consisting of Deshmukh and Sapre, JJ. The Division Bench in the referring judgment gave a clear finding that the inam in dispute was a service inam granted to Date family, but it was always recorded in the name of the seniormost member of the seniormost branch which was also the customary manner of recording the rights under the inam. The Division Bench further held that Narhari was the grantee of the inam as representing Date family and Sadashiv became the grantee in the year 1928 as representative of the family consisting of himself and his three brothers. This clear finding of the Division Bench has been reaffirmed at the later stage in para.37 of the judgment where it is observed:

> "Prima facie, according to us, it is the prior holder who must be restored the land. Who that holder is, is a question, which we have already answered in our earlier discussion. That holder of the inam was the family of Dates, though it was represented in Government records by Nawawala who was the seniormost member. Since the holder is thus the family, the regrant under Section 7, though in the name of the former Nawawala, must be deemed to be regrant to the family of Dates."

In view of the said clear finding, according to the Division Bench, the legitimate conclusion to be arrived at was that the property in the regrant was a Raytwa land and since Date family was a Hindu family governed by the Mitakshara law as administered in the Bombay area, the property must be now treated as a joint Hindu family property with the normal incidents accompanying the Mitakshara joint family property.

6. It was, however, urged by Mr. Gadgil who appeared for the appellants before the Division Bench that the above conclusion was not possible in view of the express language of Section 4 of the Act. He contended that all rights legally subsisting and all incidents of alienations were extinguished by the provisions of Section 4 of the Act and that as such it must be treated to be a

grant to Sadashiv and his branch alone without any rights in favour of the other members of Date family; that in other words, to the regranted land the normal personal law of the party would not apply, but it must be deemed to be a grant to the individual alone as a separate property. Before the Division Bench the judgment of Malvankar, J. in the case of *Dhondi Vithoba v. Mahadeo Dagdu*[1] and the judgment of the Division Bench (consisting of Vaidya and Lentin, JJ.) in First Appeal No.111 of 1966 with First Appeals Nos.176 and 204 of 1966 decided on 12-3-1975*were cited. The view taken by Malvankar, J. was the one which supported the claim of the plaintiffs while that view was dissented from by the Division Bench. When the appeal came up for hearing before Deshmukh and Sapre, JJ. they felt that the view taken by Malvankar, J. was preferable to the one taken by Vaidya and Lentin, JJ. and, therefore,

[1](1973) 75 Bom LR 290

referred the above question for determination by the Full Bench.

7. Mr. Paranjpe on behalf of the appellants (Defendants Nos.9, 10 and 11) contended that the finding of the Division Bench that the service inam was granted to Date family, that Narhari as grantee of the inam represented Date family and Sadashiv became the grantee in the year 1928 as representative of the family consisting of himself and his three brothers, is not justified if regard be had to the special features of an impartible estate and he wanted to challenge the correctness of the said finding. As this finding was given by the Division Bench after considering the decision of the Privy Council in the case of *Shiba Prasad v. Rani Prayag Kumari*[2], and the decision of the Supreme Court in the case of *Krishna v. Sarvagna Kumara Krishna*[3], we have not permitted Mr. Paranjpe to go behind this finding as it is a considered finding of the Division Bench upon appreciation of evidence and the position in law. The reference had to be made to the Full Bench because it was contended before the Division Bench by Mr. Gadgil that in view of the non obstante clause used in Section 4 of the Act all rights legally subsisting in respect of alienations like inam and all other incidents of such alienations were deemed to be extinguished. Even the incidents *qua* partition in respect of joint Hindu family property were also extinguished and, therefore, when after resumption of the inam a regrant was made it was a regrant only to the senior-most member of the branch, who was in possession of the land and enjoyment of the income therefrom at the time when the Act came into force. The submission of Mr. Paranjpe is that Section 4 whereby alienations and rights and incidents in respect thereof are abolished starts with the non obstante clause to the effect "Notwithstanding anything contained in any usage, settlement, grant, agreement, sanad, order, rule, notification or Vat Hukum or any decree or order of a Court or any law for the time being applicable to any alienation in the merged territories" which is very comprehensive in its nature, and thereby not only all rights and incidents in relation to alienations of the lands are extinguished, but even the rights of the holder under the personal law like Hindu Law, to ask for partition, are taken away. In support of this contention, reliance was placed by him upon the decision of the Division Bench of Vaidya and Lentin, JJ., above referred to and he submitted that in view of this non obstante clause as the right of a member of a joint Hindu family in respect of an impartible estate is taken away it is only the senior-most member of the senior-most branch who will be entitled to the regrant and the other members of

the joint family will not be entitled to claim any share by demanding a partition of the land on the footing that it is a joint family property.

8. The Act was amended with a view to abolish some of the alienations of miscellaneous character prevailing in the merged territories and to provide for matters consequential and incidental thereto. The word 'alienation' in the Act meant a grant or recognition as a grant (I) of a village, portion of a village or land to any person, whether such grant be of soil with or without exemption from payment of land revenue or of assignment of the whole or a share of land revenue thereof, (II) of total or partial exemption from payment of land revenue to a person in respect of any land held by him, or (III) of cash allowance or allowance in kind to any person by whatever name called, by the ruling authority for the time before merger or by the State Government after merger. Chapter II of the Act deals with abolition of alienation and conferment of occupancy rights. Section 4 of the Act

[2] AIR 1932 PC 216

[3] AIR 1970 SC 1795

deals with abolition of alienations and rights and incidents in respect thereof. Its provisions are as under:-

> "4. Notwithstanding anything contained in any usage, settlement, grant, agreement, sanad, order, rule, notification of Vat Hukum or any decree or order of a Court or any law for the time being applicable to any alienation in the merged territories with effect from and on the appointed date.
> (i) all alienations shall he deemed to have been, abolished;
> (ii) Save as expressly provided by or under this Act all rights legally subsisting on the said date in respect of such alienations and all other incidents of such alienations shall be deemed to have been extinguished."

9. Under Section 5 all alienated lands are made liable for payment of land revenue in accordance with the provisions of the Code and the rules made thereunder and the provisions of the Code and the rules relating to unalienated lands shall apply to such lands. The provisions as regards regrant of such lands are contained in Sections 6 and 7. We are concerned in the present case with Section 7(2) and its provisions are as under:-

> "7. All land held under a watan is hereby resumed and shall be regranted to the holder in accordance with the following provisions, namely:-
> (1) x x x x
> (2) in the case of a watan to which clause (1) does not apply the land appertaining to the watan shall be regranted to the holder on payment of the occupancy price equal to twelve times the amount of the full assessment of such land within the prescribed period.
> X X X X"

10. In the referring judgment a clear and unequivocal finding is given by the Division Bench that

so far as the holder prior to the abolition of the alienation was concerned, it was Date family; that Narhari was grantee of the inam as representing Date family and Sadashiv became the grantee in the year 1928 as representative of the family consisting of himself and his three brothers. The short question that was canvassed before the Division Bench was that in view of the non obstante clause in Section 4 the ordinary incident under the personal law of Hindus relating to partition of joint family property was extinguished and therefore, when a regrant was made under Section 7 it was Sadashiv alone who was entitled thereto and the other members of the family had no right to ask for a share therein by way of partition. It is undoubtedly true that Section 4 starts with a non obstante clause, but it is a well recognized canon of construction to give effect to a non obstante clause having regard to the object with which it is enacted in a statute. The non obstante clause is contained at the inception of Section 4 and the sole object of Section 4 is to abolish alienations and rights and incidents in respect thereof. The right of a member of a joint Hindu family to ask for partition of a joint family property cannot be regarded as a right relating to grant of land as service inam or as an incident in respect thereof. The sole object underlying Section 4 is to abolish all alienations defined in the statute and to extinguish all rights legally subsisting on thel appointed date in respect of such alienations and all other incidents thereof. These provisions have nothing to do with the normal rights of a member of a Hindu family under the personal law applicable to Hindus.

11. Provisions similar to those in the Act, contained in the Bombay Inferior Village Watans Abolition Act (Act 1 of 1959) came up for consideration before Malvankar, J. in *Dhondi Vithoba v. Mahadeo Dagdu reported in*[4]. He held that after the abolition of a Watan, held as joint family property or held by tenants in common, under the Bombay Inferior Village Watans Abolition Act, 1958, the resumption and regrant of the land to the Watandar of the Watan, does not take away the character of the land as joint family property or as held by tenants in common. He has further taken the view 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 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. At page 293 (of Bom LR) after summarising the provisions of the Bombay Inferior Village Watans Abolition Act, 1958 Malvankar, J. points out:-

> "It seems to me, therefore, that what Section 4 sub-ss.(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

incidences 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."

12. The decision of Malvankar, J. was cited before Vaidya and Lentin, JJ. while disposing of First Appeal No.111 of 1966 with First Appeals Nos.176 and 204 of 1966 by their judgment dated 12-3-1975. The learned Judges disagreed with the conclusion arrived at by Malvankar, J. It may be observed that before Vaidya and Lentin, JJ. Mr. Paranjpe who appeared for the appellants in that appeal made submissions totally inconsistent with the submissions made before us. Actually his submissions were in consonance with the view which has been expressed by Deshmukh and Sapre, JJ. in the referring judgment in the present case. The question that came up for consideration before Vaidya and Lentin, JJ. related to interpretation of the provisions of Section 4 of the Watans Abolition Act. The learned Judges pointed out that on a plain reading of the section along with the definition of the words "existing watan law" and 'inferior village watan" contained in Section 2, they found no difficulty in coming to the conclusion that by the section the Legislature intended to extinguish all rights and incidents in Sanadi Inam lands in suit with effect from Feb. 1, 1959 on which date the Act was brought into force in Kolhapur State by a Gazette Notification, R.D. No. PKA 1058-IX/205276-L, dated January 21, 1959, published in the Government Gazette, Part IV-B, page 160, in exercise of the powers conferred by Sub-section(4) of Section 1 of the Watans Abolition Act and that the words

[4](1973) 75 Bom LR 290

"all incidents appertaining to the said watans shall be and are hereby extinguished" must include every kind of incident including the so-called incident of a right to partition as claimed by the plaintiff in that case, even if such right existed. With respect, we are unable to concur with the conclusion arrived at by the learned Judges. The object of Section 4 was not to affect in any manner rights created under the personal law relating to the parties and if the property belonged to joint Hindu family, then the normal rights of the members of the family to ask for partition were not in any way affected by reason of the non obstante clause contained in Section 4. In our opinion, the view that has been taken by Malvankar J., in Dhondi Vithoba's case (AIR 1973 Bombay 323) is the correct view and the resumption and regrant of the land to the watandar of the watan does not take away the character of the land as joint family property or as held by tenants-in-common.

13. Accordingly, the question referred to us is answered in the negative.

14. In para 52 of the referring judgment it is made clear that if the question referred to is answered in the negative, then the decree for declaration of rights and partition as awarded by the trial Court will have to be confirmed with a rider that the decree for partition be subject to the permission of the Collector. In case such permission is not granted, all the parties will be entitled to joint possession each of the branches having one-fourth share in the property.

15. The appeal is accordingly dismissed with costs, subject to the aforesaid rider.

Appeal dismissed.