PETITIONER:
SK.SATTAR SK.MOHD.CHOUDHARI

Vs.

RESPONDENT:
GUNDAPPA AMABADAS BUKATE

DATE OF JUDGMENT: 11/10/1996

BENCH:
KULDIP SINGH, S.SAGHIR AHMAD

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T

S.SAGHIR AHMAD.J.

The landlord is in appeal before us against the Judgment and Order dated 17.1.92 passed by the Bombay High Court (Aurangabad Bench) by which the Judgment and Order dated 29.3.84 passed by the Rent Controller and that of the District Judge, Latur passed on 12.2.87, affirming that Judgment, were set aside and the suit of the appellant for eviction of the respondent from the shop in Municipal building No.2-10(Old) and 69(New), Ward No.22, Bhusar Lane, Latur, was dismissed.

2. Proceedings for eviction were initiated by the appellant on the allegations that the shop measuring 23'x19' was originally owned by his father Shaikh Mohd. Chaudhari who died on 12th of March, 1956 leaving behind the appellant and his elder brother, Shaikh Jaffar, as also two other brothers, as his heirs who inherited his properties including the aforesaid shop. Shaikh Jaffar being the eldest was managing the property, particularly as the appellant was minor in 1964 when the shop was let out to the respondent who paid rent to Shaikh Jaffar and continued to pay it till 1974. In the meantime, there was a partition among the brothers and a portion of the shop measuring 23'x12-1/2' fell in the share of the appellant who informed the respondent of the above and required him to pay rent to him. A similar information in writing was also given to the respondent by Shaikh Jaffar but the respondent did not pay rent to the appellant and consequently, his tenancy was terminated by notice dated 28.7.76. This was followed by a petition under Section 15 of the Hyderabad Houses (Rent Eviction and lease Control Act, 1954 for the eviction of the respondent on the ground of wilful default in payment of rent as also for the personal need of the appellant who wanted to run his cutlery business in the said shop.

3. This petition was filed before the Rent Controller before whom the respondent, in his reply, raised the plea that the shop having been let out to him on behalf of several brothers, he could not be legally evicted at the instance of one of them as tenancy was indivisible. He pleaded that the petition was not maintainable. He also

pleaded that the so-called partition amongst the brothers was mala fide and, in any case, notice for attornment was not given to him. He also pleaded that the shop was not bona fide required by the appellant and that, in any case, he was not a defaulter as he was all along tendering the rent to the landlord but the same was refused by him.

4. The petition was allowed by the Rent Controller by his Judgment and Order dated 29.3.84 which was upheld in appeal by the District Judge by his Judgment and Order dated 12.2.87.

5. The High Court before whom the matter was thereafter taken, reversed the Judgment of the Rent Controller and that of the District Judge principally on the ground that the question of maintainability of the petition was not considered and the Rent Controller as also the District Judge had not adverted their mind to the question that the tenancy of the shop in question, held by the respondent, was indivisible. The partition, if any, amongst the brothers would not affect the lease which would still remain indivisible and consequently, eviction proceedings at the instance of only one of the co-landlords would not be maintainable.

6. During the pendency of the appeal in this Court, the respondent purchased the remaining portion of the shop namely, the portion measuring 23'x7-1/2' which had fallen in the share of the appellant's brother, Shaikh Ahmad Chaudhari, from Smt. Zubedabi, his wife, to whom he had gifted the property and thus he claimed to have become the owner of that portion of the shop.

7. We have heard the learned counsel for the parties and have gone through the record.

8. The emphasis of the High Court was, throughout the Judgment, on the indivisibility of contract of tenancy. The High Court treaded on a path which led it to a blind alley and did not take diversion which would have opened up the road to arrive at a correct decision.

9. The basic principle of the Transfer of Property Act is that where a premise is let out by several co-owners or joint owners or co-lessors, any one of them cannot sue the tenant either for his share of rent or for partial eviction on the ground that he being the co-owner had a right not only to collect his share of rent but also to evict the tenant from his portion of the premises. The unity of estate is, undoubtedly, indivisible but the indivisibility is not perpetual. In order to remove the obsession with which the High Court suffered, it is necessary to look to various provisions of the Transfer of Property Act (for short the Act).

10. Section 36 of the Act dealing with Apportionment provides as under:-

> " 36. Apportionment of periodical payments on determination of interest of person entitled.- In the absence of a contract or local usage to the contrary, all rents, annuities, pensions, dividends and other periodical payments in the nature of income shall, upon the transfer of the interest of the person entitled to raceive such payment be deemed, as between the transferor and the transferor to accrue due from day to day, and to be apportionable accordingly, but to be payable on the days appointed

for the payment thereof."

11. This Section has to be read in the light of the provisions contained in Section 8, which provides, inter alia, that unless a different intention is expressed or necesserily implised, a transfer of property passes forthwith to the transferee all the interest which the transferor had in the property, including the easement annexed thereto as also the rents and profits accruing/due from that property after the transfer. The income or the rent in such a case has to be divided between the transferor and the transferee. If the income accrues from day to day, there would be no difficulty as it is obvious that with effect from the date of transfer, the transferee would get the right to collect income or rent and with effect from that date, the right of the transferor would come to an end. Where, however, the income did not accrue De Die in Diem, it has been provided that all periodical payments, like, yearly or monthly, in the nature of rent etc shall be deemed to accrue from day to day and shall be apportioned between the transferor and the transferee on that basis. This Section, therefore, enacts the rule relating to Apportionment By Time, while Section 37, as we shall presently see, refers to Apportionment By Estate.

12. Section 37 of the Transfer of Property Act, (without the illustrations appended thereto) provides as under:-

> "37. Apportionment of benefit of obligation on severance.- When, in consequence of a transfer, property is divided and held in several shares, and thereupon the benefit of any obligation relating to the property as a whole passes from one to several owners of the property, the corresponding duty shall, in the absence of a contract to the contrary amongst the owners, be performed in favour of each of such owners in proportion to the value of his share in the property, provided that the duty can be severed and that the severance does not substantially increase the burden of the obligation; but if the duty cannot be severed, or if the severance would substantially increase the burden of the obligation, the duty shall be performed for the benefit of such one of the several owners as they shall jointly designate for that purpose:
>
> Provided that no person on whom the burden of the obligation lies shall be answerable for failure to discharge it in manner provided by this section, unless and until he has had reasonable notice of the severance.
>
> Nothing in this section applies to leases for agricultural purposes unless and until the [State Government] by notification in the Official Gazette so directs.

13. This Section contemplates a transfer as a result of which the property is divided into several shares and each

share comes to be vested separately in each owner. In such a situation, each of the several owners will be entitled to his share of the rent or benefit of any other obligation relating to the property as a whole. But before the tenant can be required to split up the rent and pay separately to each owner, he has to be informed of the transfer by a notice which, by itself, will be sufficient to convert the single obligation into several obligations and he will be liable to pay rent to each co-sharer separately.
(See: Raja Simhadri vs PrattiPatti Ramayya ILR (1908) 29 Madras 29).

14. It is open to the owners to apportion the rent inter se, but if no such apportionment is made, the obligation of the tenant remains single and in that situation, the lessor will not be allowed to split the tenancy by recovering the rent of a part only; nor can a purchaser of a part of the property insist on payment of his part of the rent to him (See: Satyesh Chandra Sarkar vs. Haji Jillar Rahman (1918) 27 Calcutta Law Journal 438 = 45 Indian Cases 721; Keshava Prasad Singh Bahadur of Damraon vs. Mathura Kuar and ors. AIR 1922 Patna 608 = 69 Indian Cases 704).

15. A reference to Sections 36 and 37 has been made only to indicate that even if the estate is in possession of a tenant, who is under an obligation to pay rent, there can still be a severance of such estate.

16. The properties which are covered by leases are, however, dealt with separately by the Act in which the relevant provision is contained in Section 109 which is reproduced below :

> "109. Rights of lessor's transferee.
> If the lessor transfers the property leased, or any part thereof, or any part of his interest therein, the transferee, in the absence of a contract to the contrary, shall possess all the rights, and, if the lessee so elects, be subject to all the liabilities of the lessor as to the property or part transferred so long as he is the owner of it; but the lessor shall not, by reason only of such transfer, cease to be subject to any of the liabilities imposed upon him by the lease, unless the lessee elects to treat the transferee as the person liable to him;
> Provided that the transferee is not entitled to arrears of rent due before the transfer and that if the lessee, not having reason to believe that such transfer has been made, pays rent to the lessor, the lessee shall not be liable to pay such rent over again to the transferee.
> The lessor, the transferee and the lessee may determine what proportion of the premium or rent reserved by the lease is payable in respect of the part so transferred, and, in case they disagree, such determination may be made by any Court having jurisdiction to

entertain a suit for the possession of the property leased."

17. This Section is based on the maxim, Qui in jus dominiumve alterius succedit jure ejus uti debet, that is to say, rights and liabilities attached to the property (arising out of possession and control of that property) pass with the property.

18. A bare reading of the first part of the Section indicates that if the property is either transferred as a whole or any part thereof alone is transferred, the transferee comes to possess all the rights of the lessor.

19. The Proviso appended tc first part of the Section contemplates that before a tenant can be made liable to pay rent to the transferee, he must have knowledge of the transfer either through the lessor or by his transferee by a notice. Requirement of knowledge of transfer in this Section as also in Section 37 and 50 is based on the general principle of law set out by Willes, J. in De Nicols v. Saunders (1870) 22 LT 661 = 18 WR (Eng) 1106, that if a person fulfils his obligations without notice of the rights of a third party, his obligation is treated as discharged. Requirement of knowledge and the communication of notice regarding transfer of the part or the whole of the property in occupation of a tenant is a condition precedent for creating a liability in the tenant to pay rent to the transferee or the assignee of the demised pramises, but it does not have the effect of postponing the assingment or Transfer of property till the receipt of the notice. The title passes to the assignee immadiately on the execution of the Deed of Transfer or Assignment.

20. We may, before proceeding further, notice the arguments raised on behalf of the respondent that the appellant cannot take advantage of Section 109 of the Act and initiate proceedings for his eviction as his title to a portion of the shop in question is based upon "partition" and since "partition' is not a transfer within the meaning of the Act, Section 109 would be inapplicable. The suit, it is contended, was rightly dismissed by the High Court.

21. This argument is obviously based on Section 5 of the Act which provides as under:

> "5. "Transfer cf Property" Defined. - 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 transfar 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.]

22. This Section contemplates transfer of property by a person who has a title in the said property to another person who has no title. A family arrangement, on the contrary, is a transaction between members of the same family for the benefit of the family so as to preserve the family property, the peace and security of the family,

avoidance of family dispute and litigation and also for saving the honour of the family. Such an arrangement is based on the assumption that there was an antecedent title in the parties and the agreement acknowledges and defines what that title is. It is for this reason that a family arrangement by which each party takes a share in the property has been held as not amounting to a "conveyance of property" from a person who has title to it to a person who has no title.

23. This Court in Kale & Ors. vs. Deputy Director of Consolidation & Ors. AIR 1976 SC 807 and Ram Charan Das vs. Giria Nandini Devi & Ors. AIR 1966 SC 323 = (1965) 3 SCR 841, also took the same view and held that a "Family Arrangement" proceeds on the assumption that the parties, in whose favour the arrangement was made and who, under that arrangement, come to have definite and positive share in the property, is not a transfer but is only a recognition of the title already existing in them. It was also pointed out by this Court in Tek Bahadur Bhujil vs. Debi Singh Bhujil & Ors. AIR 1966 SC 292, as also in an earlier decision in Ram Charan Das vs. Giria Nandini Devi & Ors. (supra), that it was not necessary to show that every person taking a benefit under a Family Arrangement had a share in the property; it was enough if they had a possible claim or even if they are related, a semblance of a claim. Gajendragadkar, CJ, in V.N. Sarin vs. Ajit Kumar Poplai (1966) 1 SCR 349 = AIR 1966 SC 432 observed that, "the true effect of partition was that each co-parcener got a specific property in lieu of his undivided right in respect of the totality of the property of the family."

24. In the above case, the Court was concerned with the interpretation of Section 14 (6) of the Delhi Rent Control Act, 1958 (Act No. 59 of 1958) which provided, inter alia, that where a landlord has acquired any premises by transfer (emphasis supplied), no application for recovery of possession shall lie unless a period of five years had elapsed from the date of acquisition. The property in that case came to be possessed by the landlord on a partition of the co-parcenery property. It was observed by this Court as under :

> "Having regard to this basic character of joint Hindu family property, it cannot be denied that each coparcener has an antecedent title to the said property, though its extent is not determined until partition takes place. That being so, partition really means that whereas initially all the coparceners have subsisting title to the totality of the property of the family jointly, that joint title is by partition transformed into separate titles of the individual coparceners in respect of several items of properties allotted to them respectively. If that be the true nature of partition, it would not be easy to uphold the broad contention raisad by Mr. Purshottam that partition of an undivided Hindu family property Must necessarily meantransfer cf the property to the individual coparceners."

25. In coming to the above conclusion, this Court relied upon the Privy Council decision in Giria Bai vs. Sadashiv Dhundiral and ors. 43 Indian Appeals 151 = AIR 1916 PC 104, in which it was observed as under :

> "Partition does not give him (a coparcener) a title or create a title in him; it only enables him to obtain what is his own in a definite and specific form for purposes of disposition independent of the wishes of his former co-sharers."

26. In another case, namely, Commissioner of Income Tax, Gujarat vs. Keshavilal Lallubhai Patel (1965) 55 ITR 637 = AIR 1965 SC 866, it was held that an oral partition between members of a joint Hindu family cannot be treated to be partition within the meaning of Section 16(3)(a) (iii) & (iv) of the Income Tax Act, 1922.

27. Partition, specially among the coparceners, would be a "Transfer" for purposes of Registration Act or not has been considered in Nani Bai vs. Gita Bai Kom Rama Gunge AIR 1958 So 706 and it has been held that though a partition may be effected orally, if the parties reduce the transaction to a formal document which was intended to be evidence of partition, it would have the effect of declaring the exclusive title of the coparcener to whom a particular property was allotted (by partition) and thus the document would fall within the mischief of Section 17 (1) (b) of the Registration Act under which the document is compulsorily registerable. If, however, that document did not evidence any partition by metes and bounds, it would be outside the purview of that Section. This decision has since been followed in Siromani & Anr. vs. Hemkumar & Ors. AIR 1968 SC 1299 and Roshan Singh & Ors. vs. Zile Singh & Ors. AIR 1988 SC 881.

28. The Privy Council in Appovier vs. Rama Subba Aiyan (1866) 11 Moor's Indian Appeals 75, propounded the theory of intention as the true test of partition of property and observed that intention being the real test, it follows that an agreement between the members of a joint family to hold and enjoy the property in defined shares as separate owners operates as a partition, although there may have been no actual division of the property by metes and bounds. The Judicial Committee further observed :

> "in the estate each member has thenceforth a definite and certain share, which he may claim the right to receive and to enjoy in severalty, although the property itself has not been actually severed and divided."

In such a case the interest of each member stands divided though the property remains physically undivided.

29. The effect of the above judgment is that though the property remains physically undivided, which would, therefore, descend and may be dealt with as separating property by the separating member or his own heirs.

30. We have our own doubts on this question. If a partition of the joint family property takes place by act of parties, it would not, as seen above, be treated as "Transfer" within the meaning of Section 5 of the act. But if a suit for partition is filed and the partition is brought about through a decree of the Court, it would amount to a "Transfer" vide Section 2(d), which specifically excludes transfers by operation of law or under a decree or order of

a Court. Section 5, which, in a way, defines transfer, is, therefore, over-ridden by Section 2(d) of the Act. This is rather anomalous and the anomaly will have to be cured one day, particularly as "transfer" has been interpreted different by this Court in the context of different statutory provisions.

31. Leaving this question here, as it is, we may observe that although partition by agreement of parties may not amount to transfer, the principles underlying Section 5 have been applied to transfers of either the whole or a part of the demised premises under Section 109 of the Act.

32. The Calcutta High Court in Sm. Durgarani Devi vs. Mohiuddin & Ors. (1950) 86 Calcutta Law Journal 198. held that although partition was not a transfers the owners, on severance of different portions, get "all the rights contemplated by Section 109 of the Act, including the right of the owners of the severed portion to recover possession from the tenant by terminating his tenancy.

33. A Full Bench of the Madhya Pradesh High Court in Sardarilal vs. Narayanlal AIR 1980 MP 8, held that assignment of a part of holding effects a severance of the holding and entitles the transferee to proceed against the tenant. Similar view was expressed by the same High Court in an earlier decision in Pyarelalsa vs. Garanchandsa & Ors. AIR 1965 MP 1 and by the Patna High Court in Badri Prasad vs. Shyam Lal Jaiswal and Ors. A1R 1963 Patna 85. The High Court of Jammu & Kashmir in Skattar Singh vs. Rawela AIR 1954 J&K 18 took the view that "partition was a transfer to which Section 109 would be applicable.

34. The Allahabad High Court in Ram Chandra Singh & Ors. vs. Ram Saran & Ors. AIR 1973 Allahabad 173 laid down that it was open to one of the co-owners, after partition, to sue for ejectment of the tenant from his share of the leased property.

35. A Full Bench of the Madras High Court in Puthiapurayil Kannyan Baduvan & Anr vs. Chennyanteakath Puthiapurayil Alikutti & Ors. AIR 1920 Madras 838 is also of the same view.

36. The Madras and Allahabad decisions (cited above) were approved by this Court in Mohar Singh vs. Devi Charan 1988(1) RCR 654 (SC) = AIR 1988 SC 1365 = 1988(2) RCJ 471 (SC).

37. In view of the above discussion, it is obvious that the law with regard to the spliting of tenancy is not what the High Court has set out in the impugned judgment. As pointed out earlier, a co-sharer cannot initiate action for eviction of the tenant from the portion of the tenanted accommodation nor can he sue for his part of the rent. The tenancy cannot be split up either in estate or in rent or any other obligation by unilateral act of one of the co-owners. If, however, all the co-owners or the co-lessors agree among themselves and split by partition the demised property by metes and bounds and come to have definite, positive and identifiable shares in that property, they become separate individual owners of each severed portion and can deal with that portion as also the tenant thereof as individual owner/lessor. The right of joint lessors contemplated by Section 109 comes to be possessed by each of them separately and independently. There is no right in the tenant to prevent the joint owners or colessors from partitioning the tenanted accommodation among themselves. Whether the Premises, which is in occupation of a tenant, shall be retained jointly by all the lessors or they would partition it among themselves, is the exclusive right of the lessors to which no objection can be taken by the tenant,

particularly where the tenant knew from the very beginning that the property was jointly owned by several persons and that, even it he was being dealt with by only one of them on behalf of the whole body of the lessors, he cannot object to the transfer of any portion of the property in favour of a third person by one of the owners or to the partition of the property. It will, however, be open to the tenant to show that the partition was not bona fide and was a sham transaction to overcome the rigours of Rent Control laws which protected eviction of tenants except on specified grounds set out in the relevant statute.

38. Learned counsel for the respondent relied upon a decision of this Court in Badri Narayan Jha & Ors. vs. Rameshwar Dayal Singh & Ors. 1951(2) SCR 153 and contended that the severance or assignment of a part of the reversion would not affect the integrity of the lessee. This case is wholly inapplicable to the facts of the present case. In that case, there were several lessees who had divided the tenancy rights among themselves and had thus split up the lease. It was in this connection that it was laid down that an inter-se partition of the lessee rights amongst the co-lessees would not affect their liability qua the lessor for the payment of the whole rent as they continue, in status, as a single tenant. It was further observed that in law an inter-se partition of the lease hold interest would not affect the integrity of the lease.

39. The decision n Badri Narayan Jha's case was considered by this Court in Mohar Singh vs. Devi Charan & Ors. (supra) and was not followed on the ground that it related to partition of the lease-hold rights among the co-lessees.

40. We have already indicated above that during the pendency of the appeal in this Court the respondent has purchased the remaining portion of the shop, which had fallen in the share of the appellant's brother. This portion measures 23' x 7-1/2'. It has been purchased from Smt. Zubedabi, wife of appellant's brother, in whose share tho said portion had fallen on partition, and who had gifted that portion to his wife. The copy of the sale-deed has been filed in this Court, to which no objection has been taken by the counsel for the respondent. The respondent does not deny the transaction. He having purchased the remaining portion of the shop, became the owner thereof and his interest as a tenant merged in his right as an owner of that portion. He, therefore, remained a tenant only in respect of the disputed portion and consequently the suit filed by the appellant in respect of that portion was clearly maintainable.

41. In view of the above, the appeal is allowed. The judgment and order dated 17.1.1992 passed by the High Court is set aside and the suit of the appellant for the eviction of the respondent is decreed with costs throughout.