lord. It is impossible to contend that a suit in trespass is a suit contemplated by the Rent Act and which calls into question the consideration of the provisions of the Rent Act. Therefore, in our opinion, whether we look upon this suit as a suit on title or a suit for possession, it is not a suit solely triable by the new Court set up under s. 28, and in respect of this suit the jurisdiction of this Court has not been ousted.

The result, therefore, is that the appeal succeeds and the order of the learned Judge below will be set aside and the suit will go down for trial on merits. In view of the order made by us on April 14, 1952, the appellant must pay the costs of this appeal. The respondent to pay to the appellant the costs of the issue tried by the learned Judge below. Costs to be set off.

Attorneys for appellant: *Manilal, Kher, Ambalal & Co.*

Attorneys for respondents: *Khunderao, Laud & Co.*

Appeal allowed.

P. M. P.

APPELLATE CIVIL

Before Mr. Justice Bhagwati and Mr. Justice Dixit.

BAI RAMLAXMI RANCHHODLAL (ORIGINAL PLAINTIFF), APPELLANT *v.* THE BANK OF BARODA, LTD. (ORIGINAL DEFENDANT), RESPONDENT.*

1952 *Feb. 1*

Indian Registration Act (XVI of 1908), ss. 17 (1), 49—Partition of joint family property—Unregistered deed of partition—Admissibility of document to prove fact of partition—"Collateral transaction," meaning of—Civil Procedure Code (Act V of 1908), O. XXI, r. 103—Scope of suit—Right of erstwhile coparcener to present possession as tenant-in -common—Whether right can be established in such suit.

Where a memorandum of partition of the immovable properties belonging to a joint Hindu family is not registered though it requires registration, it is inadmissible in evidence under the main provisions of s. 49 of the Indian Registration Act, 1908, to prove the terms of the partition. But the severance of joint status which is not required to be effected by a registered instrument is a collateral transaction within the proviso to the section and the memo. is admissible to prove the fact of such partition.

The expression "collateral transaction" in the proviso to s. 49 of the Indian Registration Act is used not in the sense of a transaction

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*First Appeal No. 500 of 1948.

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ancillary to a principal transaction or a transaction subsidiary to the main transaction. The recorded transaction would be a particular or specific transaction, but it would be possible to read in that transaction *the* purpose of the transaction and *a* collateral purpose. The fulfilment of that collateral purpose would bring into existence a collateral transaction, a transaction which may be said to be a part and parcel of *the* transaction but nonetheless *a* transaction which runs together with or on parallel lines with the same.

Narmadabai v. *Rupsing*,[1] followed.

Rudragouda v. *Basangouda*,[2] and *Tribhovan Hargovan* v. *Shankar Desai*,[3] referred to.

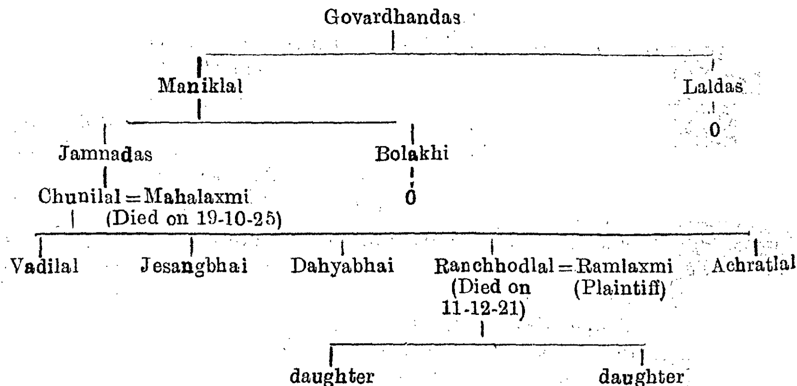
A suit under O. XXI, r. 103 of the Civil Procedure Code, 1908, is one for the purpose of establishing the right which the plaintiff claims to the present possession of a property. An erstwhile coparcener who cannot establish his right to possession of any property as the sole owner thereof under the terms of a deed of partition owing to non-admissibility of the deed for want of registration can in such suit establish the claim to the present possession thereof in his right as a tenant-in-common with other members of the separated family.

Krishnarao v. *Ghaman*,[4] referred to.

FIRST APPEAL from the decision of B. David, Civil Judge (Senior Division) at Ahmedabad.

Suit for declaration.

The property in suit consisting of a house situate at Ahmedabad originally belonged to a joint Hindu family the members of which are shown in the following genealogical tree:—



Govardhandas had two sons Maniklal and Laldas. Laldas died without leaving any issue surviving. Maniklal had two

(1) (1937) 39 Bom. L. R. 1102.
(2) (1937) 40 Bom. L. R. 202.
(3) (1943) 45 Bom. L. R. 866.
(4) (1934) 36 Bom. L. R. 1074.

sons Jamnadas and Bolakhi. Bolakhi also died without leaving any issue surviving. Jamnadas' son was Chunilal. Chunilal had five sons, Vadilal, Jesangbhai, Dahyabhai, Ranchhodlal and Achratlal. Ranchhodlal died on December 11, 1921, leaving him surviving his widow Ramlaxmi (plaintiff) and two daughters by her. Chunilal died on October 19, 1925, leaving him surviving his widow Mahalaxmi. Chunilal was at all the relevant times the manager of the joint family.

The joint family owned considerable movable and immovable property and an ancestral business in money-lending and jewellery which was carried on in the name of Maniklal Govardhandas. The family also floated a limited company in the name of the Hindustan Oil Mills Company Ltd. of which Chunilal Jamnadas & Co. were the managing agents. The joint family owned a ten annas share and an outside partner owned a six annas share in that managing agency firm. The business of managing agents was looked after by Chunilal Jamnadas and Achratlal Chunilal.

Towards October 1920 the parties thought of partitioning the properties of the family and so the work of fixing up details of the partition started. On December, 16, 1920, a memo. of partition was recorded and signed by Chunilal and his five sons. A list of properties given to the various sharers was first set out in the memo. The paragraph that followed the list then said that the partition had been made on the conditions mentioned in the writing. That was followed by the conditions of the partition which were stated to be binding on the parties. The writing wound up by saying that the parties agreed that they had partitioned their various properties willingly and that they admitted the partition as stated in the document. The document was attested by one Kapurchand Gopalji who made the following endorsement at the foot:—

"The partition as above has been made in my presence."

This was, however, a partial partition of the properties belonging to the family. Certain properties continued to be joint and certain adjustments of accounts remained to be made. Therefore, on April 19, 1922, another memo. of partition was recorded between the parties. Ranchhodlal had died in the meantime and hence this memo. was signed by Chunilal, his four surviving sons and the plaintiff as the widow of

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Ranchhodlal. The writing practically contained various conditions of partition between the parties and was again attested by Kapurchand Gopalji.

In February 1923, plaintiff started living separately in the suit property along with her two daughters. Food grains were purchased for her, repairs were effected to the property, Municipal taxes and insurance premia were paid in regard to the same and various other expenses were incurred for her and all those were debited to the account of Ranchhodlal which was maintained in the books of account.

Even after the partition the managing agency firm of Chunilal Jamnadas & Co. continued to manage the affairs of the Hindustan Oil Mills Co. Ltd., though the share in the commission which was enjoyed by the joint family was divided between Chunilal and his five sons in certain proportion. The firm came into financial difficulties and approached the Bank of Baroda Ltd. (defendant) for a loan. On February 13, 1924, the loan was sanctioned on a promissory note for Rs. 60,000 executed by Chunilal and Achratlal, and on March 6, 1924, title deeds of certain immovable properties including the suit property were handed over by Chunilal to the defendant by way of equitable mortgage. Chunilal, however, at that time represented to the defendant that he was the sole owner of those properties by succession. On May 22, 1925 and April 12, 1926, Achratlal created two further charges in favour of Thakorlal and Sobhagchand respectively on two of the properties equitably mortgaged with the defendant.

In 1925, the Hindustan Oil Mills Co. Ltd. went into liquidation and the defendant realised part of its loan by sale of the properties of the company which were equitably mortgaged with it. In the meanwhile, Chunilal died on October 19, 1925, leaving him surviving a widow Mahalaxmi.

On August 7, 1928, the defendant filed a suit, being Suit No. 1188 of 1928, for the recovery of Rs. 35,742-5-6 being the balance of its dues and for the realisation of the mortgage security which consisted *inter alia* of the suit property against Vadilal, Jesangbhai, Dahyabhai, Achartlal, viz. the four sons of the deceased Chunilal, Mahalaxmi the widow of Chunilal and the plaintiff. The plaintiff was impleaded as a party defendant to the suit only because she was staying in the suit property. The relief claimed was for a decree for recovering the dues of the defendant by sale of the houses inclusive of the

suit property of the sole ownership, possession and enjoyment of the deceased Chunilal subject to the charges in favour of Thakorlal and Sobhagchand. In case of deficit, the further prayer was for a decree to recover the same from the other properties of the deceased Chunilal.

The plaintiff contested the claim by contending that she was not an heir of the deceased Chunilal, that the suit property was not of the sole ownership of Chunilal and that Chunilal had no right to mortgage it as it had fallen to her husband's share in the partition effected on December 16, 1920.

The trial Court negatived the plaintiff's contentions and she had to file an appeal to the High Court. The High Court set aside the decree on the ground that the plaintiff was not a person who was interested in the equity of redemption or in the mortgage security or against whom the mortgagee would be entitled to any relief in the suit. The suit against the plaintiff was dismissed and the usual preliminary decree was passed against the other parties to the suit with a declaration that the properties therein mentioned inclusive of the suit property were equitably mortgaged to the defendant by the deceased Chunilal as belonging to him.

In time to come a decree absolute for sale was passed and in execution of that decree the defendant was declared the purchaser of the suit property as the highest bidder thereof. The sale certificate was issued on September 7, 1941, and in pursuance of it the defendant sought to take possession. The plaintiff, however, obstructed with the result that the defendant had to file an application under O. XXI, r. 97 of the Civil Procedure Code for removing that obstruction. The application was granted on April 18, 1942.

On April 20, 1942, the plaintiff filed the present suit against the defendant under O. XXI, r. 103 for a declaration that she had a right to continue in possession of the suit property. She also claimed that she had become owner of the property by adverse possession as also by reason of the partition.

The defendant contended that the suit property was one of the properties belonging to the joint family and that Chunilal as the manager of the family had mortgaged it to secure the repayment of the sum which had been advanced by the defendant to the joint family business of Chunilal Jamnadas, and that the defendant had become the owner of all the right, title and interest of the parties to the Suit No. 1188 of 1928 in

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the suit property by reason of the auction sale. The defendant further denied the allegations in regard to adverse possession and partition.

The trial Court was of the opinion that the deed of partition dated December 16, 1920, not having been registered was inadmissible in evidence, and therefore the alleged partition between Chunilal and his son Ranchhodlal was not proved. In regard to the plea of adverse possession also the Court found against the plaintiff, and consequently it dismissed the plaintiff's suit.

The plaintiff appealed to the High Court.

S. M. Shah, with *K. T. Pathak*, for the Appellant.

B. G. Thakor, with *B. K. Mehta*, for the respondent.

Bhagwati J. [After narrating the facts and holding that the memo. of partition was not merely a record of past partition but was itself a deed of partition which required registration under s. 17 (*1*) of the Registration Act, and was, therefore, inadmissible in evidence for want of registration, the judgment proceeded:] When this line of attack was not available to the plaintiff, it was sought to be argued that even though the document Exh. 57/1 could not be received as evidence of any transaction affecting the suit property, it would certainly be available to the plaintiff, even though unregistered, as evidence of a colloteral transaction not required to be effected by a registered instrument within the proviso to s. 49 of the Indian Registration Act for the purpose of proving the fact of partition. It was urged that if in fact a partition had been effected between the members of the joint family on December 16, 1920, there was a severance of joint status between the members of the family. Chunilal Jamnadas then ceased to be the manager or *karta* of the joint family and to represent the other members of the joint family in all transactions affecting the immovable properties belonging to the joint family and that therefore when he created an equitable mortgage *inter alia* of the suit property in favour of the bank on March 26, 1924, he had no right or authority to mortgage the right, title and interest of the other members of the joint family in the suit property. If that was so, the bank would only acquire by reason of the creation of the equitable mortgage in its favour as and by way of security the right, title and interest of Chunilal Jamnadas in the suit property. Whatever right, title and interest the other members of the

joint family had acquired in the suit property as on a severance of joint status would not be affected by any purported dealing therewith by Chunilal Jamnadas and Ranchhodlal and after his death his heir the plaintiff would as a tenant-in-common with the other members of the erstwhile joint family be entitled to possession of the suit property and such possession enjoyed by the plaintiff would be enough to establish her right to relief in this suit.

Two objections were however urged against this contention which was put forward on behalf of the plaintiff. The one was that this contention was not set out in the plaint nor was it the subject-matter of any issue nor had it been urged in the 58 grounds of the memo. of appeal which had been presented before this Court. It is no doubt true that the Plaintiff based her claim merely on the first memo. of partition contending that the suit property was allotted exclusively to the share of her deceased husband Ranchhodlal and came to be owned by him and thereafter his heir the plaintiff and that therefore her possession was the possession of an owner which could not be disturbed by the order complained against. No alternative plea of this type was ever thought of by the draftsman of the plaint and it was only for the first time when this appeal was being argued before us that such a plea was sought to be resorted to. This criticism is no doubt true. When the plaint came to be drafted, the draftsman of the plaint had not thought of this position at all. When the suit came to be heard by the lower Court nobody thought of this position again. The memo. of partition was rightly rejected by the Court as inadmissible in evidence for want of registration and the lower Court came to the conclusion that in the absence of the memo. of partition the plaintiff could not establish her right to the suit property. The plaintiff's suit was dismissed by the lower Court on that basis, and the main burden of the song in the memo. of appeal also was that this memo. of partition did not require registration and was therefore wrongly excluded by the Court. Even the arguments before this Court proceeded on this basis that the memo. of partition was a record of a past partition. In spite of all these circumstances, however, we are of the opinion that it would be open to the plaintiff to rely upon this alternative ground as it would follow as a matter of legal consequence from the proved fact, viz. that there was a partition effected between the members of the joint family on December 16, 1920.

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We may at this stage as well consider what is the scope of the suit under O. XXI, r. 103, of the Civil Procedure Code. Order XXI, r. 103 of the Code, provides that:

"Any party not being a judgment-debtor against whom an order is made under rule 98, rule 99 or rule 101 may institute a suit to establish the right which he claims to the present possession of the property; but, subject to the result of such suit (if any), the order shall be conclusive."

The suit is evidently for the purpose of establishing the right which the plaintiff claims to the present possession of the property. This right may be established by the plaintiff in any manner whatever available to him. He may do it by establishing that under the terms of a deed of partition he is entitled to the possession of the property as the sole owner thereof. He may also establish the claim to the present possession of the property in his right as a tenant-in-common with the judgment-debtor. He may establish the right to the present possession of the property by any other vestige of title which he may have acquired in that property. The question is what is the plaintiff's claim to the present possession of the property, not whether he is the sole owner of the property. The sole ownership of the property as falling to the share of Ranchhodlal by virtue of the partition dated December 16, 1920, was no doubt the only count on which this plea of the plaintiff was sustained in the plaint which she filed. That would not, however, be sufficient to prevent the plaintiff if she could establish her claim to the present possession of the property as a tenant-in-common with the other members of the joint family from doing so, and in our opinion she should not be prevented from urging this contention if it is open to her, provided however that it can be taken up by her in this Court even at this late stage without any prejudice to the interest of the bank. That this is the true construction of O. XXI, r. 103, is borne out by a judgment of Mr. Justice N. J. Wadia reported in *Krishnarao* v. *Ghaman*[1] where the learned Judge held that:

"The scope of a suit under r. 103 of Order XXI, Civil Procedure Code, filed to contest an order made under either r. 98, or r. 99, or r. 101, is not the determination of the mere question of possession of the parties concerned but the establishment of the right or title by which the plaintiff claims the present possession of the property."

The learned Judge adopted this as a quotation from the decision in *Unni Moidin* v. *Pocker*.[2] In regard also to the pleadings in the mofussil it has been recognised that they are not

(1) (1934) 36 Bom. L. R. 1074. (2) (1920) 44 Mad. 227.

always artistically drawn and they should not be construed too strictly. If it is open to the party on the admitted facts to rely upon a particular contention, it would be open to the Court to allow it to do so, and we can do no better in this behalf than quote the observations of their Lordships of the Privy Council in *Karam Chand* v. *Ahmad Aziz Ahmad*.[1]:

"The object of pleading is to give fair notice to each party of what his opponent's case is, and, therefore, where a plaint is inartistically drawn and seeks to rest a justifiable claim upon an unjustifiable basis, it cannot, by its form, be said to be prejudicial to the defendant, if the Court, on the deduction from all the documents read together with the oral evidence, decrees the plaintiff's claim."

These observations of their Lordships of the Privy Council are sufficient warrant for us to allow the plaintiff to take up this alternative plea even at this late stage if we can allow her to do so without any prejudice to the interest of the bank.

The other objection which was urged against this contention of the plaintiff was that it would cause great prejudice to the interest of the bank if the plaintiff were allowed to do so. It was urged by Mr. B. G. Thakore that this was not the subject-matter of the pleadings or any issue or the evidence which was led by the plaintiff in support of her claim, and that if this had been pleaded in the first instance in the plaint the bank would have adduced evidence in this behalf and would have moreover taken up a contention which was available to it under s. 41 of the Transfer of Property Act. In regard to the bank leading evidence on this point, it may be observed that there is nothing in that contention. Evidence was led on behalf of both the parties in regard to the partition and what the plaintiff is seeking by urging this alternative contention is that even if the memo. of partition be not available to her by reason of the want of registration thereof to prove that on a partition of the movable and immovable properties belonging to the joint family the suit property came to the share of her deceased husband Ranchhodlal, the deed of partition would be available to her to prove a collateral transaction of partition, i.e. severance of joint status which the law does not require to be effected by a registered instrument. Within the terms of the proviso the fact of partition could be proved though the details of that partition could not be proved by her for want of registration of the memo. of partition. That being the position, it could not be urged that any evidence which

[1] (1938) 40 Bom. L. R. 1053, F. C.

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ought to have been led was not led or was not open to the bank to lead in the Court below. If there was any evidence which would go to contradict the fact of partition, it was certainly open to the bank to have led it in the trial Court. No further evidence remained to be led which it did not lead before the Court below by reason of this alternative contention not having been taken up by the plaintiff in her plaint. In regard to the applicability of s. 41 of the Transfer of Property Act also that plea was open to the bank to take in the lower Court if it had been so advised. Whether the deceased Ranchhodlal, and after his death his widow the plaintiff, were in possession of the suit property as sole owners thereof or as tenant in common with the other members of the erstwhile joint family, the title deed of the suit property was at relevant date or dates in the possession of Chunilal Jamnadas. No mutation of names had been effected in the Conservancy Register of the Municipality at Ahmedabad right up to 1925 and Chunilal Jamnadas created an equitable mortgage *inter alia* of the suit property in favour of the bank by representing himself as the sole owner of the suit property. If these circumstances were such as to create any right in the bank under s. 41 of the Transfer of Property Act, the bank ought to have been advised to plead the same in the written statement which it filed in answer to the plaintiff's claim. No better or worse right could have been contended for in answer to the plaintiff's claim under s. 41 of the Transfer of Property Act by reason of this alternative plea than what was available to the bank in answer to the plaintiff's claim based on the sole ownership in the suit property having been obtained by the deceased Ranchhodlal under the memo. of partition dated December 16, 1920. If the bank was not advised to take this plea under s. 41 of the Transfer of Property Act in answer to the plaintiff's claim as it stood formulated in the plaint, no prejudice can be caused to the interest of the bank if we allowed the plaintiff to urge the alternative contention mentioned above, proving the fact of partition resulting in the severance of the joint status between the members of the family and the enjoyment of the suit property by her as tenant-in-common with the other members of the erstwhile joint family. In regard to both these objections therefore we are of the opinion that they do not avail the bank and we would be right in allowing the plaintiff to urge this alternative contention of hers.

In regard to this alternative contention of the plaintiff it was, however, urged by Mr. B. G. Thakore that what was sought to be proved was not permissible to the plaintiff having regard to the proviso to s. 49 of the Indian Registration Act. Mr. B. G. Thakore contended that not only the terms of the deed of partition could not be proved but also the fact of partition itself could not be proved by the plaintiff. Before going to the authorities which have been cited before us at the bar in regard to this contention, we think that it would be useful to quote the summary of the position in law which has been given in Mulla's Registration Act, 5th edn., at page 53, under the heading "Change of Status." It is stated there:

"An instrument of partition among members of a joint Hindu family dividing the family properties by metes and bounds requires registration. If it is not registered, it is inadmissible in evidence, having regard to s. 49 to prove the *title* of any of the parties to the instrument to any particular property, or to prove that any particular property has ceased to be joint. But is it admissible to prove an intention to become divided in *status*, in other words, to prove that the parties ceased to be joint from the date of the instrument? On this point there is a conflict of opinion, it being held in some cases that it is, and in others that it is not. The former view seems consistent with the decision of the Privy Council in the undernoted case (*Rajangam Ayyar* v. *Rajangam Ayyar.*")[1]

In the foot note at p. 53 of this commentary where the cases are grouped showing that the document is admissible to prove an intention to become divided in status, in other words, to prove that the parties ceased to be joint from the date of the instrument, we find noted the case decided by a division bench of our High Court in *Narmadabai* v. *Rupsing.*[2] The division bench there was constituted by Mr. Justice Barlee and Mr. Justice Sen and it may be noted that my brother Dixit was counsel for the appellant in that appeal. The contention which was urged by him before the Court prevailed and their Lordships held that an unregistered deed of partition is inadmissible in evidence in view of ss. 17 and 48 of the Indian Registration Act to prove the terms of the partition, but it is admissible in evidence to prove the fact of partition in the legal sense of the term. Mr. B. G. Thakore, however, drew our attention to a decision of a division bench of our High Court reported in *Rudragouda* v. *Basangouda.*[3] The division bench

[1] (1922) L. R. 50 I. A. 134.
[2] (1937) 39 Bom. L. R. 1102.
[3] (1937) 40 Bom. L. R. 202.

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there was constituted by Mr. Justice Wassoodew and Mr. Justice Thakore and even though it was *obiter* Mr. Justice Thakore expressed the following view:

"Memoranda of partition, when unregistered, cannot be allowed to prove the fact of partition or the terms of partition, neither of which is a collateral purpose, nor the fact that a severance in interest was created which also is not a collateral purpose."

This was an expression of opinion which was contrary to the opinion of Mr. Justice Wassoodew who observed that:

"The reference to arbitration for the purpose of division of the family property, even if unregistered, can be regarded as constituting proof collateral of the fact that the parties intended to sever."

Much can be said in favour of the view which was taken by Mr. Justice Thakore. The point, however, which we have got to consider is what is a collateral transaction within the meaning of the proviso to s. 49 of the Indian Registration Act. The expression "collateral" transaction is used not in the sense of an ancillary transaction to a principal transaction or a subsidiary transaction to a main transaction. The root meaning of the word "collateral" is running together or running on parallel lines. The transaction as recorded would be a particular or specific transaction. But it would be possible to read in that transaction what may be called *the* purpose of the transaction and what may be called a collateral purpose, the fulfilment of that collateral purpose would bring into existence a collateral transaction, a transaction which may be said to be a part and parcel of *the* transaction but nonetheless a transaction which runs together with or on parallel lines with the same. An obvious illustration of this is the transaction which is recorded in the memo. of partition before us. The transaction therein recorded was a transaction of partition of the movable and immovable properties belonging to the joint family. These properties were alloted to the shares of the respective members of the family. A partition was in fact effected by this document and that transaction took place under the terms of the document itself. The memo. of partition thus required registration, and not being registered could not be admitted in evidence under the terms of s. 49 of the Indian Registration Act. There was, however, involved in this transaction itself a collateral transaction, viz. that of the severance of the joint status which transaction by itself did not require to be registered by any law for the time being in force. A severance of joint status could be effected under

Hindu law in various modes, one of the modes being an unequivocal expression of an intention to separate. A partition could be effected orally as well as by a written document, and it would be open to a party to prove that there was a partition or severance of joint status effected between the parties without its being effected by a registered instrument. A partition, i.e. severance of joint status, thus would be a collateral transaction, and would certainly fall within the proviso to s. 49 of the Registration Act. The partition of immovable property belonging to the joint family which requires to be effected by a registered instrument would be inadmissible in evidence under the main provisions of s. 49 of the Registration Act, but the partition, i.e., the severance of joint status, which is not required to be effected by a registered instrument, would be a collateral transaction, evidence of which would be certainly be admissible under the proviso to the section, and the memo. of partition which was inadmissible for want of registration would certainly be admissible to prove the fact of such partition. With respect, therefore, we are not inclined to accept the opinion of Mr. Justice Thakore and would prefer to follow the view expressed in *Narmadabai* v. *Rupsing*,[1] which, as already observed before, has been approved of and is in accordance with the decision of the Privy Council in *Rajangam Ayyar* v. *Rajangam Ayyar*.[2]

Mr. B. G. Thakore also drew our attention to a decision of Mr. Justice Sen sitting as a single Judge reported in *Tribhovan Hargovan* v. *Shankar Desai*.[3] In that case an unregistered sale deed of property valued at less than Rs. 100 had been executed and it could not be used in evidence by the party for proving his title to the property. The transfer of property had taken place by delivery of the same to the purchaser and the purchaser sought to prove his title to the property by referring to the unregistered document as explaining the character of the possession thereof by him. It was held that in such a case the sale-deed could not be admitted under the proviso to s. 49 of the Indian Registration Act to prove that the delivery was in respect of the sale transaction. He could base his case on the transfer in his favour having taken place by delivery of the property, and if that availed him all well and good, but the nature and character of that possession

[1] (1937) 39 Bom. L. R. 1102. [2] (1922) L. R. 50 I. A. 134.
[3] (1943) 45 Bom. L. R. 866.

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could not be explained by him by having resort to the unregistered sale deed. This case so far as it goes is against the contention of Mr. B. G. Thakore and we do not want to say anything more than this that we accept the ratio which is adopted in *Narmadabai* v. *Rupsing,* and the summary of the position in law as it has been given in the passage from Mulla's Registration Act at page 53 quoted above.

It is clear, therefore, from the observations which we have made above that it would be open to the plaintiff in the case before us to rely upon the unregistered memo. of partition in order to prove the fact of partition. On a perusal of the memo. of partition it is abundantly clear that the parties to the memo. of partition, viz. Chunilal Jamnadas and his five sons, effected the partition of the properties, movable and immovable, belonging to the joint family and to the firm of Messrs. Manikchand Govardhandas. There is no doubt that some of the properties were left undivided and were to be divided between the parties after December 16, 1929. There is this, however, to be said in favour of the plaintiff that according to the position in Hindu law if once a partition is proved to have been effected between the members of a joint and undivided Hindu family, it would be a severance of the joint status between the members of the family, and in the absence of any of proof to the contrary it would be a partition which would be complete both as regards the persons as well as the properties. That is the presumption in Hindu law which may be rebutted no doubt but the burden of rebutting it is on the party negativing the contention. If regard be had to the fact that on December 16, 1920, Chunilal Jamnadas the father and his five sons in the presence of Kapurchand Gopalji arrived at a partition of the properties, moveable and immoveable, belonging to the joint family detailed in the first memo. of partition and appended their signatures thereto in token thereof, it is sufficient to establish that there was severance of joint family status between them and a partition was thus effected between them. The fact of the partition is thus proved by this memo. of partition even though it is not registered in accordance with the the provisions of s. 17 (*1*) of the Registration Act and, even though it is not available to the plaintiff to prove that the suit property in fact was allotted to the share of her deceased husband Ranchhodlal as the property of his sole ownership.

[The rest of the judgment is not material to the report.]

DIXIT J. [After dealing with points not material to the report the judgment proceeded.]

The second question argued is more important. It is argued by Mr. S. M. Shah that the memo. of partition, exh. 57/1, evidences a record of a past partition and so it does not require registration. He says that if he fails in that submission, he would contend, in the alternative, that the memo. of partition is nevertheless admissible for the purpose of proving the fact of partition. Mr. B. G. Thakore, on the other hand, contends that the memo. of partition, exh. 57/1, is not good enough either for the first or the second of the two purposes. It was suggested by Mr. B. G. Thakore that the memo. of partition, exh. 57/1, must have been brought into existence some time after the year 1925. It was said that the memo. of partition was not produced in the suit of 1928. It is, however, to be noted that the existence of this memo. of partition prior to 1925 receives support from the entries made in the books of account. These entries have been referred to by my learned brother and they were all made prior to 1924. The evidence of Jesangbhai Chunilal is that he wrote out the memo. exh. 57/1, and the parties who have appended their signatures to the memo. all of them, signed in his presence. The conclusion is inevitable that the memo. was executed as described in the memo. and that the memo. was in existence prior to 1924. A fair reading of the memo. of partition shows that it is not a record of a past transaction. It is a document which would properly fall within s. 17 (*1*) of the Indian Registration Act, and if it is not registered, then it cannot affect immovable property comprised in the memo. I, therefore, agree with my learned brother in holding that this memo. of partition being unregistered cannot be received in evidence for the purpose of showing that the suit property fell to the share of Ranchhodlal at the partition in the year 1920.

It then remains to consider the alternative submission urged by Mr. S. M. Shah and repelled by Mr. B. G. Thakore. Now, under Hindu law a partition may take place in one of two ways. Partition may be as to separation in status and partition may be separation in estate, i.e., division by metes and bounds. To the extent that this document has been sought to be used for the purpose of showing partition of the latter kind, it is evident that the memo. of partition cannot be received in evidence having regard to s. 49 of the Indian Registration Act, but I am not prepared to accede to the argument urged

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by Mr. B. G. Thakore that the memo. of partition cannot be received in evidence for the purpose of proving the fact of the partition. So far as material, s. 49 of the Indian Registration Act provides that:

"No document required by section 17......to be registered shall—

(1) affect any immoveable property comprised therein, or......

(c) be received as evidence of any transaction affecting such property ......unless it has been registered."

So that what s. 49 prohibits is the reception of an unregistered document for the purpose of proving the document as affecting immovable property. There is, however, to s. 49 a proviso, and the proviso, so far as material, says that:

"Provided that an unregistered document affecting immovable property and required by this Act......to be registered may be received as evidence......of any collateral transaction not required to be effected by registered instrument."

Mr. B. G. Thakore argued that s. 91 of the Indian Evidence Act was in the plaintiff's way. It seems to me, however, that for the limited purpose for which the unregistered memo. of partition is admissible, it does not offend s. 91 of the Indian Evidence Act. Section 91 speaks of exclusion of oral by documentary evidence and what s. 91 prohibits is the proof of the terms of a document by oral evidence where a document is of the description mentioned in s. 91. Therefore, if a document properly falls within the terms of s. 91, then the only evidence which can be given in proof of the terms of the document is the document itself and no oral evidence can be given to prove the terms of the document. I am not, therefore, impressed by the contention that s. 91 is really any bar. Mr. S. M. Shah has not urged, and could not urge, that he would ask us to look at the unregistered memo. of partition for the purpose of proving the terms of the partition.

The question, however, remains whether the unregistered memo. of partition cannot be received as evidence of any collateral transaction not required to be effected by a registered instrument. The expression "transaction" is not defined in the Indian Registration Act. I think it would be difficult to give a precise definition of the expression "transaction". But it is to be noted that s. 49 does not say that an unregistered document which requires to be registered shall not at all be received in evidence. All that it says is that it cannot be received in evidence as affecting immovable property, and as the proviso shows, it can be received as evidence of any collateral transaction not required to be effected by a registered

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instrument. Now, separation in status does not require to be evidenced by a registered document. Separation in status is a matter of individual volition and can be expressed by a notice given by one member of the family to another, or it can be expressed by conduct. It has not been suggested, so far as I am aware, that a transaction in the shape of separation in status is ever required to be effected by a registered instrument.

The question then arises whether the fact of partition cannot be proved by looking at the unregistered memo. of partition. When the unregistered memo. of partition is admissible in order to be looked at for the purpose of proving the fact of partition, one does not endeavour to find out the terms of partition. The terms of partition are different from the partition which in law takes place by way of separation in the status between the members of the family. In my opinion, therefore, an unregistered memo. of partition, such as the one in the present case, can be received as evidence of the collateral transaction in the shape of proving the fact of partition. It may be that this method of looking at the document may indirectly affect immoveable property comprised therein. But that is not the same thing as proving the terms of the partition. When once it is established that under Hindu law a partition may take place in one of two ways, and if the second kind of partition cannot be proved because of want of registration, I do not see any valid ground for holding that partition in the sense of separation in status cannot be proved by reference to this document. It is true that this is an arguable question. Two views are possible and there is authority in support of either of the two views. But I think, on the whole the better view is the one which has been suggested by my learned brother, and at any rate, this view has a good deal of authority in support as against the other view which seems to have little authority in its favour. I think the view taken in *Narmadabai* v. *Rupsing*[1] and the opinion expressed by Mr. Justice Wassoodew in *Rudragouda* v. *Basangouda*[2] are correct and the contrary opinion expressed by Mr. Justice Thakore in the latter case is, with respect, not correct.

For all these reasons I agree to the order proposed by my learned brother.

Appeal allowed.

M. W. P.

[1] (1937) 39 Bom. L. R. 1102.

[2] (1937) 40 Bom. L. R. 202.