

Santosh

**IN THE HIGH COURT OF BOMBAY AT GOA
SECOND APPEAL NO. 14 OF 2004**

- 1. TERTULIANO RENATO DE SILVA,** s/o. Santan A De Silva, major in age, married, residing at H.No.177, Manor Hill, Vasco-da-Gama, Goa.
- 2. MARIA LEVONICA VIANNEY PEREIRA,** d/o. Francisco Xavier C. Pereira, major in age, married, Government Teacher, residing at H.No.177, Manor Hill, Vasco-da-Gama, Goa.

...Appellants

~ VERSUS ~

- 1. FRANCISCO LOURENCO BERTENCOURT DE SILVA,** s/o. Santan A. De Silva, major in age, married, residing at Belavista Apartments, 2nd floor, Margao, Goa.
- 2. SMT. SAVITA FILOMENA CACIANA ALMEIDA,** d/o Jose Inacio Almeida, major in age, married, housewife, 2nd floor, Belavista Apartments, Margao, Goa.

... Respondents

APPEARANCES

FOR THE APPELLANTS **Mr YV Nadkarni**, *with N Noronha
and Ms D Shirgam*

FOR THE RESPONDENTS **Mr RG Ramani**, *with P Kakodkar*.

CORAM : **G.S.Patel, J**

DATED : **11th AUGUST 2017**

ORAL JUDGMENT:

1. The Second Appeal was admitted on 1st April 2004 on the following substantial questions of law:

(a) Whether provisions of Section 2184 of the Portuguese Civil Code still continue in force and are available in the facts of the case, more particularly as the Deed of Exchange was executed on 24/12/1971 after the Transfer of Property Act, 1954 was brought in force in Goa?

(b) Whether partition which is merely severance of joint status cannot be effected orally and has necessarily to be a written document?

2. I have heard the learned Counsel on both sides at some length. Mr Nadkarni for the appellants, the original defendants, has constructed, if I might say so, a compelling case on the questions of law as framed. The argument is sophisticated and relentlessly logical. The edifice of his argument is, however, considerably weakened, as we shall see, by the serious lacunae in the material adduced by the defendants. This has a direct, albeit possibly unintended and, from

the defendants' perspective, an unfortunate consequence when it comes to these questions of law.

3. For the reasons that follow, I have not been persuaded to hold for the defendants. Mr Ramani's answer for the respondents, the original plaintiffs, is typically short, narrowly focussed and furnishes a complete answer.

4. First, a brief background culled from the record. The appellants are the original defendants in Regular Civil Suit No.146 of 2000. This was originally filed in 1990. It came to be renumbered much later. The suit was decreed on 16th April 2002 by the Civil Judge, Junior Division, Vasco da Gama, Goa.

5. The suit itself was for partition. The 1st plaintiff and the 1st defendant are brothers, the 1st defendant being the elder. The 2nd plaintiff and the 2nd defendant are their respective spouses. The plaint alleged, at its forefront in paragraph 2, that by a Deed of Exchange dated 24th December 1971, the plaintiffs and defendants exchanged some of their land holdings. These are said to have been described fully in the Deed of Exchange. Consequently, according to the plaintiffs, the defendants acquired a moiety in the property of the plaintiffs known as 'Dactolem', some 360 sq mtrs in area, at Mangor Hill. The plaintiffs, in turn, and as part of this exchange, acquired a one-half share in two properties of the 1st defendant: about 780 sq mts on the western side of 'Dactolem', and another property Aforamento within plot No. 59, both at Mangor Hill. It was said that there existed two buildings, not owned by the defendants, and the

Deed of Exchange stated that these two buildings equally belonged to the two plaintiffs and the two defendants. Descriptions of the three properties are in paragraph 3. It is said that these properties and two buildings were, at a time, jointly possessed by the parties. In paragraph 3, the plaintiffs also expressed an intention to divide and partition the properties by metes and bounds, but said such a partition was not possible because the defendants refused. Paragraph 4 makes reference to an Advocate's letter dated 7th October 1989 from the plaintiffs, to which there was no reply. Paragraph 6 describes the properties in better detail.

6. The plaintiffs allege the cause of action accrued to them around end-October 1989 when the defendants failed to effect a partition pursuant to the legal notice dated 7th October 1989 and, hence, it is alleged that the suit is not barred by limitation. The plaintiffs did not claim that any actual partition had been earlier effected.

7. It is on this that the plaintiffs sought the following relief:

"(a) That by a decree of this Hon'ble Court the aforesaid three properties fully described in para 6 above along with the two buildings be partitioned in metes and bounds in equal proportion between the plaintiffs and the defendants."

8. From this, it is clear that the claim to partition by metes and bounds is based on the Deed of Exchange of 24th December 1971.

9. Both defendants entered written statements. The 1st Defendant's principal defence was that there was no question of now seeking partition. According to him, as set out paragraph 3 of the written statement at page 91:

the properties were already partitioned after the Deed of Exchange was executed and ever since then the respective parties are exclusively in possession and enjoying of their partitioned portions.

(Emphasis added)

10. There is an allegation in paragraph 2 that the Deed of Exchange is vitiated by fraud, coercion and undue influence. But the statement in paragraph 3 of the 1st defendant's written statement is to the effect that the partition was, in fact, effected and that this partition followed the Deed of Exchange. Later, in sub-para (d), the 1st defendant claims that the partition was not in strict conformity with the Deed of Exchange. But that matters little at this stage. All that seems to be of consequence is in paragraph 4 of the 1st defendant's written statement. This is what he says:

"From the above it is clear that after the Deed of Exchange an actual partition was effected between the parties taking into consideration several factors. Since then both the parties have believed and acted as if the Deed of Exchange was given full effect by the mutually agreed partition actually carried out between the parties by the oral understanding."

(Emphasis added)

11. The defendants' plea therefore is that there was an actual partition, and that this partition was on the basis of an oral understanding of 1974. This narrative we find at paragraph 3(f) page 94:

3(f) **The actual partition of the property Dactolem in the manner shown at Exh 'X' was effected by the parties hereto somewhere in the middle of 1974. Since then the parties hereto are in exclusive possession of their partitioned shares.** Somewhere in Dec, 1974 plaintiff no.1 gave on lease to Chowgule personnel (4 families) portion marked with letter (a) at Exh 'X'. **The plaintiff also retained ownership and exclusive possession of their property at Dactolem.** So much so plaintiff no. 1 even erected a septic tank in his property at Dactolem for the benefit of his tenants. At point 'Y' of Exh 'X' the location of the septic tank is shown.

(Emphasis added)

12. This is the heart of the case regarding the oral agreement and there is no possibility of saying that there was no actual partition. The defendants' own pleading is contrary.

13. The 2nd defendant, the 1st defendant's wife, too filed written statement, at page 97. In this, she merely says that she follows the written statement of the 1st defendant, and not a thing more. Again, this will have some consequence, because, as we shall see, when confronted with a document signed by the 1st defendant, Mr Nadkarni ventured an argument that the 2nd defendant was a creature apart; and what might bind the 1st defendant would not bind his spouse. From her written statement, it is clear she herself

did not share Mr Nadkarni's late epiphany, and made no attempt at any stage to put any distance between herself and her husband.

14. Before the Trial Court, the 1st defendant and the 1st plaintiff led evidence. The Trial Court decreed the suit. It ordered the partition of the suit properties. The defendants appeal to the District and Sessions Judge, South Goa at Margao failed. The First Appellate Court dismissed the defendants' Regular Civil Appeal No. 87 of 2002 on 15th October 2003.

15. The First Appellate Court framed and answered the following four points for determination were framed:

- | | | |
|---|--|---------------------|
| 1 | Whether the appellants prove that the suit was barred by limitation? | Negative. |
| 2 | Whether the plaintiffs had proved that they are the co-owners of half of the three suit buildings and the two buildings therein by virtue of the deed of exchange of 24.12.1971? | Affirmative. |
| 3 | Whether the defendants proved that the properties had been partitioned in 1974 by an oral understanding? | Negative. |
| 4 | Whether the plaintiffs proved that the properties are to be partitioned in equal shares. | Affirmative. |

16. It is the third of these that is said to raise the substantial question of law involved. This was addressed by the First Appellate Court in the following manner:

"37. Point No.3:- **It was the case of the defendants that the three properties were partitioned in 1974 by an oral understanding, as per the terms pleaded in the written statement.** The defendants have also led evidence in this respect. **But the fundamental question is whether the partitioning of immovable property can be done orally.**

38. Section 2184 of the Portuguese Civil Code deals with the "External form of partition of immovables". It provides as under:

"Partition of immovables is null and void if it not is made by a deed or public document."

39. **The said provision of the Portuguese Civil Code is still in force in Goa and it has not been repealed by the Transfer of Property Act 1954 as there are no similar provisions contained in the Transfer of Property Act which was extended to Goa after the Liberation of Goa.** As such, the said Section 2184 still has the force of law. D.W.1 had deposed that the partition had been done and he admitted that the partition is done only between the co-owners. **But there is no written deed of partition produced by the defendants to prove that the properties had been partitioned.** In the absence of the deed of partition, I hold that the defendants had failed to prove that the properties had been validly partitioned in 1974 and there is no question of examining whether there was an oral partition as the same is impliedly barred by the provisions of Section 2184 of the Portuguese Civil Code referred to above. Accordingly, I hold that point no.3 also has not been proved."

(Emphasis added)

17. On its own, this has raised the question of law to which I adverted earlier, and which Mr. Nadkarni addresses. I will put this in context before I return to it, and the context is what the First Appellate Court also said in paragraphs 22 and 23 of the impugned Judgment:

"22. Again P.W.1 has deposed that he had sent a legal notice through his advocate to the defendant no.1 and the same is on record at exhibit P.W.1/F. By the said notice, dated 7.06.88, the defendant no.1 had been called upon to come forward for amicable partitioning of their various properties at Varca and Mangor Hill. P.W.1 also produced the reply sent by defendant no.1 on 2.7.88 and the same is at exhibit P.W.1/E. In the said reply, the defendant no.1 had admitted that he and the plaintiff no.1 jointly owned various properties both in Varca and Mangor Hill at Vasco. He also indicated his willingness to partition his properties.

23. Thereafter, the legal notice dated 7.10.1989 was sent to the defendants to agree for the partitioning failing which the plaintiffs would institute legal proceedings for partitioning the properties. The fact remains that the defendants had not responded to the said notice and accordingly the cause of action for filing the suit for partitioning the properties arose in October 1989".

(Emphasis added)

18. This is important because these paragraphs refer to the two documents marked Exhibit PW1/F and Exhibit PW1/E. In evidence, these documents were led by the plaintiffs. The 1st plaintiff deposed to them. He said that he had by his advocate's letter of 7th

June 1988 demanded a partition of the properties from his brother, the 1st defendant. That document was marked Exhibit PW1/F. The 1st defendant replied in person on 2nd July 1988 to the plaintiffs' Advocate. That document is marked Exhibit PW1/E. The 1st plaintiff deposed to both in examination-in-chief conducted on 3rd April 1998 and noted at pages 100 and 101 of the record.

19. The document of 2nd July 1988, the 1st defendant's reply, and marked Exhibit PW1/E is worth reproducing in full.

From:

Mr. Tertuliano R. Da Silva, MPT Hospital, Vasco-da-Gma

Date: 2nd July, 1988.

To,

Adv. Kamalakant N. Pai,
III Floor, Gosalia Bldg.,
MARGAO-GOA

Sir,

I am in receipt of your letter dated 7.6.88 address on behalf of your client Shri Francisco B. Da Silva of Margao to which I reply as under: -

That it is true that I and your client jointly own various properties both at Varca and Mangor Hill at Vasco.

That the Mangor Hill houses have been independently rented by me and your client and we receive rents from our respective tenants. That your client is not entitled for any rents from my tenants or of the house occupied by me.

I have not taken any advance from any of my tenants and utilised the same and in fact even if I received any advance it is not the concern of your client. It is your client who has

collected huge amount under the pretext of repairs of the house in occupation of your client's tenants and the same is used by your client thereby neglecting the repairs which weakens the house. It is also not correct that your client ever spent any amount for the development and maintenance of the said property.

That your clients have not paid any loan obtained by my wife from Goa Urban Co-op. Bank and the same if at may be proved by documentary evidence.

That I would be happy to partition the properties which I am entitled along with your client from our parents and also to finalise all the accounts I have spent on the purchase of the properties on the development and maintenance and different valuables like gold ornaments which belong to me and are lying in your client's hand.

I would be also happy to fix any Sundays first or third Saturdays or public holidays to hold the talks and also I would like to make my father as a party to the talks on any of the above dates so that I can also bring my counsel and witnesses who knows the facts. The talks to take place at Varca in any house of our parents.

Hope you shall advice your client accordingly and inform me in advance of the date fixed for talks.

Yours faithfully,

Sd/-

(TERTULIANO R. DA SILVA)

(Emphasis added)

20. The emphasized paragraphs of this letter show that the evidence on record, and this correspondence in particular, points to the defendants having accepted joint ownership, and that until 2nd July 1988 no partition had been effected. There is no mention in this of any oral partition, or of any oral understanding of 1974 or any other date. Mr Nadkarni has argued that for that matter there is no mention of the 1971 Deed of Exchange either in the plaintiffs' advocate's letter, but as we have seen it is the 1st defendant's case in his written statement that there was a partition, albeit not strictly in conformity with the Deed of Exchange of 24th December 1971, but following it on the basis of an oral understanding. The plaintiffs' case was not that there was ever any actual partition.

21. Even if the appellants are correct on the substantial questions of law, it would not be appropriate to answer these at all in the present case, given the evidentiary and factual background. In fact, the questions seem to me ones that cannot arise. They could not have arisen even before the First Appellate Court, and have been impermissibly raised in the Second Appeal. One must set questions of law in Second Appeals not in the abstract. They must fairly be said to arise on the basis of the pleadings, evidence and material. If they do not, then there is no question of deciding them, however great the temptation to do so. In my view, a decision on these questions of law in such a context would result in a decision wholly obiter. If such questions do not arise, then following the provisions of Section 100(4) and (5) of the Code of Civil Procedure 1908 ("CPC"), I would have little option to dismiss the appeal, and to hold that no such question of law arises.

22. The first substantial question of law noted earlier was cast as the third point for determination for the first time before the First Appellate Court. No such argument was canvassed before the Trial Court. It is also unclear why, before the First Appellate Court, although the documents at Exhibit PW1/E and Exhibit PW1/F were shown and actually referred, a correlation was not made between these documents and the question of an alleged oral understanding of 1974. On their own, these documents put paid to any such alleged oral understanding, and there is an unequivocal acceptance by the defendants that till 1988, no actual partition had been made.

23. The frame of Mr Nadkarni's argument is that Article 2184 of the Portuguese Civil Code demands that any partition of immovable property be by, and only by, in writing, a 'public' document. According to him, this provision stood impliedly repealed after the Transfer of Property Act was made applicable in the State of Goa. He has taken me through the materials in compilation and I will refer to this to the extent necessary.

24. Our point of embarkation is the decision of a Division Bench of this Court in the Panaji Seat in *Cadar Constructions v Tara Tiles*.¹ That was a Letters Patent Appeal on the question of limitation. The issue before the Division Bench was whether the provisions of the Portuguese Civil Code or the Indian Limitation Act would apply. Of necessity, the judgment considered the historical background of this State. This is what paragraphs 11, 12 and 13 of that decision say:

1 1989 (2) Goa Law Times 180.

"11. It is now a matter of common historical knowledge that on 19th of December 1961, this Union Territory was liberated, conquered in international law, by the Government of India. By the Constitution (12th Amendment) Act, passed by the Parliament, this Union Territory was made a part of the Republic of India with effect from 20th of December 1961. Due to the integration of the Union territory, naturally, several difficulties arose and in order to remove those difficulties the President of India issued directions and promulgated regulations from time to time. We may refer to the relevant ones for understanding the points arising in this Letters Patent appeal. The Goa, Daman and Diu (Laws) Regulation 1962, hereinafter referred to as Regulation No. 12 of 1962, was promulgated by the President of India. Section 3 of this regulation provides that the Acts mentioned in the Schedule of that Regulation shall extend to this Union Territory subject to the modifications also mentioned in the Schedule. Mere extension of the Acts as mentioned above does not automatically bring into force the said Acts. Subsection (2) of Section 3 of the said Regulation provided that the provisions of each Act mentioned in the Schedule shall come into force in the Union Territory on such day as the Administrator by notification in the Government Gazette appoint. Provision was also made for bringing into force the different Acts on different dates and also different provisions of the same Act on different dates. What is important for our purposes is the provision contained in Section 4 of the said regulation which is in the following terms:—

"Any law in force in Goa, Daman and Diu or any area thereof corresponding to any Act referred to in Section 3 or any part thereof shall stand repealed as from the coming into force of such Act or part in Goa, Daman and Diu or such area as the case may be."

Sub-section (2) of Section 4, however, provided that despite the repeal as mentioned in sub-section (1) of that section, any right, privilege, obligation or liability acquired accrued or incurred under any law so repealed shall not be effected. **It is common ground that before 20th of December 1961 there was in this Union Territory, what has been called the Portuguese Civil Code.** It provided for the rights and liabilities of the persons. It also provided for the periods within which the said rights would be enforced or the periods after the expiry of which the liabilities could be extinguished.

12. **The Portuguese Civil Code continued in this Union Territory by virtue of Section 5 contained in the Goa, Daman and Diu (Administration) Act, 1962. This provision provided that the existing laws will continue to be in force in this Union Territory until amended or repealed by a competent legislature or other competent authority. This Act, namely the Administration Act of 1962 actually replaced an earlier ordinance which has been promulgated on 5th of May 1962.**

13. We have already made a reference to Regulation No. 12 of 1962 and the fact that it provided for the extension of certain laws mentioned in the Schedule to that regulation to this Union Territory. We have also mentioned that the laws were to come into force on such dates which would be fixed by the Lieutenant Governor of the Union Territory. We may mention that the Negotiable Instruments Act, being Act 26 of 1881, was mentioned in the Schedule to Regulation No. 12 of 1962. By a notification issued by the Lieutenant-Governor this Act was brought into force in this Union Territory with effect from 1st of December 1965. **We may now briefly refer to another regulation being Goa, Daman and Diu (Laws) No. 2 Regulation, 1963 which regulation is called Regulation No. 11 of 1963.** Provisions similar

to those contained in Regulation No. 12 of 1962 are to be found in this regulation of 1963. **In the Schedule to this regulation are to be found the Indian Contract Act, Sale of Goods Act and the Transfer of Property Act, by an appropriate order issued by the Lieutenant governor of this Union Territory, the Transfer of Property Act was brought into force in this Union Territory on 1st of November, 1965.** Similarly, the Contract Act and the Sale of Goods Act were brought into force in the Union Territory on 1st of December 1965. **The position is thus clear, namely that under the competent legislation and in exercise of the powers conferred by the said legislation the Transfer of Property Territory on 1st of November 1965 and one month thereafter the Negotiable Instruments Act, the Contract Act and the Sale of Goods Act were also brought into force in the Union Territory."**

(Emphasis added)

25. The Goa, Daman & Diu (Administration) Act, 1962 came into force on 5th May 1962. It defined the appointed day for that Act as 20th December 1961. Section 5 of that Act says that all laws that existed before the appointed day for Goa, Daman and Diu would remain in force until amended or repealed by a competent legislature or other competent authority. Further, the Central Government could, within two years from the appointed day, by order, make such adaptations and modifications, whether by way of repeal or amendment, as necessary or expedient. Section 6 empowers the Central Government to extend, by notification in the Official Gazette, with such restrictions or modifications as thought necessary to these territories of Goa, Daman and Diu any enactment in force in a State on the date of the Notification.

26. The Goa, Daman and Diu (Laws) Regulation, 1962 followed. While this did was to include in the Schedule several statutes. The Transfer of Property Act was not among them. The Goa, Daman and Diu (Laws) No.2, Regulation, 1963 was the one that brought the Transfer of Property Act into operation in Goa. Sections 3 and 4 of the Regulation 1963, read thus:

"3. Extension with amendments of certain laws to Goa, Daman and Diu and their commencement therein

— (1) The Acts, as they are generally in force in the territories to which they extend, shall extend to Goa, Daman and Diu, subject to the modifications, if any, specified in the Schedule.

(2) Notwithstanding anything contained in sub-section (1) or in the relevant provision, if any, of each such Act for the commencement thereof, the provisions of each such Act shall come into force in Goa, Daman and Diu on such date as the Lieutenant-Governor may, by notification in the Goa, Daman and Diu Gazette, appoint:

Provided that different dates may be appointed for different provisions of any Act and for different areas and any reference in any such provision to the commencement of the Act shall be construed as a reference to the coming into force of that provision in the area where it has been brought into force.

4. Repeal and saving.— (1) Any law in force in Goa, Daman and Diu or any area thereof corresponding to any Act referred to in section 3 or any part thereof shall stand repealed as from the coming into force of such Act or part in Goa, Daman and Diu or such area, as case may be.

(2) Nothing in sub-section (1) shall affect—

- (a) the previous operation of any law so repealed or anything duly done or suffered thereunder; or
- (b) any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed; or
- (c) any penalty, forfeiture or punishment incurred in respect of any offence committed against any law so repealed; or
- (d) any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid,

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed as if this Regulation had not been made:

Provided that anything done or any action taken (including any appointment or delegation made, notification, instruction or direction issued, form, bye-law or scheme framed, certificate obtained, permit or licence granted, or registration effected) under any such law shall be deemed to have been done or taken under the corresponding provision of the Act extended to Goa, Daman and Diu by this Regulation and shall continue to be in force accordingly unless and until superseded by anything done or any action taken under the said Act."

(Emphasis added)

27. The Transfer of Property Act is noted as the eighth item in the Schedule to the 1963 Regulation. As Section 4 of the 1963 Regulation makes clear, where there are corresponding provisions between the Act later brought into force and the earlier Act, the earlier stands repealed. For the record, the Partition Act is still not made applicable to the State of Goa.

28. The Transfer of Property Act was notified as being brought into force in Goa by a Notification dated 6th October 1965 with effect from 1st November 1965.

29. Mr Nadkarni argues that read together, Section 9 and Section 5 of the Transfer of Property Act, makes two things clear: (i) that a partition is a form of transfer of property; and (ii) such transfer may be oral and need not compulsorily be in writing.

30. At this stage, one must note Article 2184 of the Portuguese Civil Code:

"Partition of immovables is null and void if it is not made by a deed or public document."

Mr Nadkarni's argument, therefore, is that there is no question of a written document being required to effect a partition after the Transfer of Property Act was made applicable to Goa. This was on 1st November 1965. What the defendants alleged was an oral transfer of 1974, nine years after such an oral was made permissible.

31. He relies on, first, a decision of Single Judge of the Bombay High Court in *Ganu v Shankar*.² Mr Justice JL Nain noted that there was a conflicting decision of various High Courts as to whether a partition is or is not a transfer of property. He noted that the view of the Bombay High Court was consistent that it was a transfer within the meaning of Section 5 of that Act.

32. One of the decisions that he relied upon in support of this was of a Division Bench of this Court in *Soniram Raghushet & Ors v Dworkabai Shridharshet & Anr*.³ Here, a Division Bench of Bhagwati & Chainani JJ noted that the Transfer of Property Act does not deal with partition *per se*, but deals with certain categories of transfer of property, such as sales, mortgages, leases, exchanges, gifts. They noted various decisions and commentaries. The rival arguments addressed whether a partition is a transfer, or an exchange or a surrender. In paragraph 4, the Division Bench said:

"4. These observations do really show that even though there may be no acquisition of property as such by reason of a partition, the property having devolved upon the co-owners of the co-sharers by inheritance or having been held as joint family property by them by processes known to Hindu law, the effect of partition is that the property which was thitherto enjoyed by all the members of the joint family as co-owners or co-sharers is after the partition, so far as the shares allotted to the respective members of the joint family are concerned enjoyed by them for their sole use and as their sole property. The co-ownership and the joint enjoyment no doubt come to an end and in its place

2 1969 Mh LJ 379.

3 AIR (38) 1951 Bom 94.

and stead is substituted the sole enjoyment and the sole ownership of the property which falls to the share of each member of the joint family. But as a necessary corollary of this, there is an extinction of the right which the other co-owners or co. sharers of the property had of enjoying that property in common with the co-owner or co-sharer to whose share that particular property is allowed as a result of the partition. That extinction of the right is brought about by what may be described as the process of the exchange of similar rights between the various co-owners and co-sharers of the joint family property or by a renunciation of the right by the other co-owners or co-sharers in favour of the co-owner or co-sharer to whom the property is allotted as a result of the partition, or by a conveyance of these rights of enjoyment of the property in common by the other co-owners and co-sharers in favour of the co-owner or co-sharer to whom that property is allotted as a result of the partition. Whatever be the process which may be said to bring about this result of the co-owner or co-sharer to whom the property is allotted by the partition getting the property for his sole use, the result is that the person who gets the property on partition is constituted the sole owner of that property and he acquires in that particular property not only his own share, right, title and interest therein which he erstwhile enjoyed but also the shares, right, title and interest of the other co. owners or co-sharers of his in that property. This certainly would be a transfer of property within the meaning of Section 5, T. P. Act. **A partition need not necessarily be in writing.** At p. 89 in the commentary on the T. P. Act Sir Dinshah Mulla has observed:

“Where no writing is required by the Act the transfer may be made orally. Thus a partition of joint family property may be made orally, & so also a surrender or a lease. ... In *Imperial Bank of India v. Bengal National Bank. Ltd.* AIR

1931 Cal 223, Rankin C. J., said that partition, release and surrender are all forms of transfer but that so far as the T. P. Act is concerned they come under no restriction."

These observations of Rankin C. J. quoted by Sir Dinshah Mulla from *Imperial Bank of India v. Bengal National Bank, Ltd.* AIR 1931 Cal 223 go to support the reasoning which we have adopted above. The case in *Masa Goundan v. Arunachala Goundan* 44 M.L.J 513; A.I.R. 1923 Mad. 577 adopted this reasoning which was contained in the observations of the learned Judges of the Calcutta H. C. in *Atrabannessa Bibi v. Safatullah Mia* 43 Cal. 504; A. I. R. 1916 Cal. 645 and the same reasoning was also adopted by the Division Bench of our High Court in *Waman v. Ganpat* 37 Bom. L.R. 925; A.I.R. 1936 Bom. 10. **We are in perfect accord with that reasoning and we are of the opinion that a partition by metes & bounds between the members of a joint Hindu family amounts to a transfer within the meaning of the definition thereof contained in Section 5, T. P. Act.**

(Emphasis added)

33. On facts, the Division Bench concluded that the partition before them effected a transfer of property.

34. The decision of the Single Judge in *Ganu vs Shankar* was followed by another Single Judge of our Court in *Balkrishna s/o Bhagwanji Lohi & Ors v Prakash s/o. Sheshrao Lohi & Ors*,⁴ holding that a right of partition is an incident of property determined from a question of exchange, a matter that might be covered by Section 118 of the Transfer of Property Act. In short, a partition may involve a

4 2014 (2) All MR 784.

matter of surrender of right or share, without necessarily involving an exchange. It nonetheless partakes all the incidents of a transfer within the meaning of Section 5 of the Transfer of Property Act.

35. Mr. Nadkarni concludes this aspect by saying that there is no other way to examine the situation; anything else would result in a complete absurdity, viz., that a partition by oral agreement is possible everywhere in the country except Goa, where a written document is needed. But that in itself is no absurdity. There is a historical reason for this, one noted in *Cadar*. There are many statutes which have not yet been extended to Goa. When it comes to holding immovable property, many states have restrictions that are not applicable anywhere else. This has to be distinguished from a consideration of whether or not a particular statute has force in the territory of a particular State of the Union of India. The Supreme Court in *Syndicate Bank v Prabha D Naik & Anr*,⁵ was examining a question of the applicability of the Limitation Act and its enforceability in relation to the Portuguese Civil Code. It could not be that the same suit could be time barred in Andhra Pradesh, Kerala, Karnataka and Maharashtra, but within time in Goa, or *vice versa*. The conflict before the Supreme Court in that case was between the procedural law in Article 535 of the Portuguese Civil Code and the Limitation Act. The conflict was noted in paragraph 19. The Supreme Court advised caution against too readily adopting the doctrine of implied repeal.

5 (2001) 4 SCC 713.

36. The situation, therefore, is this: in the Transfer of Property Act, there is no specific mention of a partition being required to be in writing. What Mr. Nadkarni argues is that because partition is species of transfer and since the Transfer of Property Act, has been made applicable to Goa in 1965 from that date, oral partitions are possible. He has placed before us a decision of the learned Single Judge of this Court (FM Reis J, as he then was) in *Molu Costa Molic v Shrinivas Raghoba Molic & Ors*,⁶ where the Court held in paragraph 8 that Article 2184 of the Portuguese Civil Code is still in force in the State of Goa and if a partition is purported to be effected otherwise by a public document, it would be a nullity. Of course, Mr. Nadkarni argues that the questions framed before us did not arise in the case before Reis J. The conflict was not even noted. There was no argument made on the question of doctrine of implied repeal. He therefore submits that the decision in *Molic* is no precedent.

37. With this brief discussion, I move on to why I believe the questions do not arise in the present case. We have seen the two documents of 1988. The first one is a notice addressed on behalf of plaintiffs through their advocate to the 1st defendant demanding partition of their various properties. The response from the defendants was that the possession was joint, and that there was no objection to the partition. Mr. Nadkarni insists that his clients ought to have been given an opportunity to offer an explanation on these letters if they are to be used against him. He is at some pains to point out that there is no mention either of these letters in the plaint. Hence, the defendants had no opportunity of being able to deal with it at the stage of pleadings. It is submitted that the plaintiffs' counsel

should have sought from the defendant his explanation about these letters. I believe that argument to be misconceived. These documents were in evidence before the 1st defendant set foot in the witness box. The 1st defendant had with him copies of these documents and his brother's, the 1st plaintiff's testimony. He did address himself to at least one of the documents that the 1st plaintiff had put into evidence as Exhibit PW1/A (page 130). He therefore knew of the documents led by the plaintiffs. Yet he made no mention of either of these two letters at Exhibit PW1/E or PW1/F. It cannot be that he was waiting for the plaintiff to confront them and would only then offer some explanation that might scuttle the plaintiff's case. If there was any explaining to be done, it was for the 1st defendant to do on his own and not for him to stand by in the expectation that the plaintiffs would hit a self-goal. The two letters in question were not hidden from the 1st defendant. He could have addressed himself to them at any time. An admission, unless explained, furnishes the best evidence.⁷ An admission is substantive evidence and can be used without being put to the maker of it in cross-examination, though it may not be conclusive proof of the matters admitted.⁸ The question of 'conclusive proof' here is moot: the admission is not sought to be used as evidence of a partition effected, but rather to show that the defendants' case as pleaded, of an already-effected partition, was, by their own admission in writing, incorrect. Mr Nadkarni is, I think, incorrect in suggesting that the only way to obtain an explanation for an admission is by forcing the opponent to elicit that explanation. No law requires this. A party

7 *Ramji Dayawala & Sons (P) Ltd v Invest Import*, (1981) 1 SCC 80.

8 *Bharat Singh and Anr v Bhagirathi*, AIR 1966 SC 405; *Murlidhar Sapuji Valve v Yallapa Lalu Chougule*, AIR 1994 Bom 358.

does not have to go out of his way to disprove or weaken his case, or to strengthen his opponents. Once the document is marked in evidence, it is for the party who follows him into the witness box to provide whatever explanation he wishes. He may then be cross-examined on that explanation, and then confronted with contradictions. But to say that a party who relies on an admission in writing cannot do so because he did not himself 'get' an explanation from the other side is simply wrong. He was not bound to do so. It was enough for him to put that document into evidence and then to await an explanation from the opponent. The plaintiffs did nothing to prevent the defendants from offering an explanation. They did not take the defendants unawares. The plaintiffs' documents were all known to the defendants before they led their own evidence. A lacuna in the defendants' evidence cannot be covered up in this fashion. Not having provided an explanation, I do not think it is possible or even reasonable to say in the guise of this Second Appeal and by raising this question of law he should now be permitted to do that which he ought to have done at trial.

38. Having regard to these circumstances, and in this factual background, it is my judgment that no such question arises. The reason is plain. The two documents that I have referred to above are telling. The earlier actual partition pleaded by the defendants remained unproved. The defendants' entire argument proceeds on the assumption that the earlier partition was proved, and the only issue was one of its legality. That is not so. The evidence shows that even according to the defendants, there was no partition in 1974. In that scenario, there is no question of deciding whether the partition al-

leged by oral agreement was or was not in consonance with any particular law, or whether there is any conflict of law.

39. Mr. Nadkarni responds that if this be so, then whole of the discussion on point no.3 in the impugned order of the Appellate Court was unnecessary. Perhaps it was, but that does not and cannot alter the outcome. If that question does not arise, then there is no reason to interfere and to compel remand on any of these issues. The question of whether Article 2184 of the Portuguese Civil Code impliedly repealed is, therefore, not one that falls for determination in this second appeal.

40. Mr. Nadkarni argues that having regard to Section 100(4) and (5) set out below, this question must be decided and it is not open to say that no such question arises. I do not think this is at all correct. His reference to the decision of a three-Judge Bench of the Supreme Court in *Kichha Sugar Company Limited v Roofrite Pvt Ltd*⁹ is misplaced. All that the *Kichha Sugar* decision said was that while holding that the question of law does not arise, reasons should be indicated, howsoever briefly. I believe that I have done that.

"100. Second appeal.® (1) Save as otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law.

(2) An appeal may lie under this section from an appellate decree passed ex parte.

9 (2009) 16 SCC 280.

(3) In an appeal under this section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal.

(4) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.

(5) The appeal shall be heard on the question so formulated **and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question**

Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the court to hear, for reasons to be recorded, the appeal on any other substantial question of law formulated by it, if it is satisfied that the case involves such question."

(Emphasis added)

41. Having regard to the totality of these circumstances, the Second Appeal fails. It is accordingly dismissed. There will be no order as to costs.

42. I must express my gratitude to learned Counsel on both sides for the concision of their presentation and their fairness of approach.

(G.S. PATEL, J.)