

Hurmat Bibi and Others

Vs

Prodosh Kumar Bajpayee and Another

Civil Appeal No. 593 of 1974

(B. C. Ray, K. Jagannatha Shetty JJ)

03.11.1987

ORDER

1. The stranger purchasers, respondents in this appeal, filed a suit in the Court of the Civil Judge, Banaras for partition of the property namely premises called 'Rock House' at Darjeeling and a plot land in the city of Banaras. The partition suit being Suit No. 54 of 1946 on the file of the Civil Judge Banaras was decreed in preliminary form. At the time of the preliminary decree Mohd. Hanif and Mohd. Amin who were defendants 2 and 4 in the partition suit made an application under Section 4 of the Partition Act to buy up the shares of the plaintiffs in the Rock House. Their prayer was allowed by the court and the court valued the plaintiffs' share in that house would be sold to Mohd. Hanif and Mohd. Amin provided they deposited the aforesaid amount in court within three months.

2. Against the preliminary decree Mohd. Hanif and Mohd. Amin preferred an appeal before the Allahabad High Court for revaluing share amount fixed by the court below from Rs. 13,926 to Rs. 1000 only. The appeal was, however dismissed. It appears that Mohd. Hanif and Mohd. Amin failed to deposit the said amount and the share of the plaintiffs was not sold to them. Subsequently however, the final decree was passed in the suit on the basis of the report and map preferred by Commissioner appointed in the case.

3. This decree was transferred to the Darjeeling court by the Banaras court for division and delivery of possession of the Rock House, to the respective shareholders according to the final decree. When the matter was thus pending, the legal representatives of the original defendants made an application under Section 4 of the Partition Act for buying up the shares of the plaintiffs in the Rock House. This application was allowed by the Subordinate Judge, Darjeeling by holding as follows :

After taking into consideration the various decisions of different High Courts on the matter, their Lordships have held in the case cited above that an application under Section 4 of the Partition Act is maintainable even after the final decree in the suit was passed and drawn up and before the possession of the allotted property was delivered to the stranger in execution by him of the said decree. It is, therefore, clear that the final decree passed in the partition suit in question is no bar to the maintainability of the application under Section 4 of the Partition portions of the Darjeeling property has not been delivered to the OPs. Therefore, the applicants are entitled to buy up the share of the plaintiffs OPs in the Darjeeling property. The contention that the prayer under Section 4 of the Act is barred by the principles of res judicata cannot also hold good. This is more so, because the present applicants did not themselves file any application under Section 4 of the Act earlier or before the

Banaras court. It is true that these applicants have been brought on record as heirs of Mohd. Hanif who along with Mohd. Amin filed the earlier application under Section 4 of the Act before the Banaras court. Yet, it cannot be disputed that upon the death of Mohd. Hanif his heirs have acquired an independent right to buy up the shares of the strangers under Section 4 of the Act. These applicants come before this Court as members of a family to which the Darjeeling property belonged as a family dwelling house. They thus, can maintain the present application under Section 4 of the Act irrespective of the fate of a similar application filed by Mohd. Hanif.

4. It has therefore been held that the applicants were entitled to buy up shares of the plaintiffs in the 'Rock House'. The court directed that valuation be made after giving the parties an opportunity to make their respective submissions before the court. For this purpose December 14, 1971 was fixed for hearing of the parties or their lawyers to determine the proper value of the property in question.

5. Against this order a civil revision petition was filed being Civil Rule No. 105 of 1972 before the High Court at Calcutta. The High Court after hearing observed :

It appears that the learned Subordinate Judge has come to his conclusion relying upon a decision reported in Satyanarayan Chakraborty v. Biswanath Pal (74 CWN 871). In our opinion that decision has no application to the facts of the present case. There is no doubt about the proposition that a co-sharer can file an application at any stage of the proceeding before delivery of possession is made pursuant to the final decree in a suit for partition. But the present question is whether a party in whose favour an order for pre-emption under Section 4 had been passed and who had failed to avail himself of the opportunity that was given to him, can still maintain a fresh application for the same purpose under Section 4 of the Act. In our view this question must be answered in the negative.

6. The High Court therefore set aside the judgment of the court below by holding that the application made by the successors-in-interest of the defendants in the suit is not maintainable. Against this order the instant appeal by special leave has been filed in this Court.

7. It has been urged us by Mr. T. S. Krishnamurthy Iyer, learned counsel appearing on behalf of the respondents that as the predecessors of the applicants who were already given an opportunity in respect of their application under Section 4 to deposit the amount fixed by the court within a certain time and the same being not taken advantage of, the second application under Section 4 of the Partition Act was rightly rejected by the High Court. In support of this submission, the learned counsel also contended that the preliminary decree for partition has been made final and demarcation of the property has been made according to the map of the Commissioner and the possession is required to be given to the parties according to final decree. In that view of the matter the counsel said that the High Court was justified in rejecting the application under Section 4 made by the appellants.

8. We are unable to accept these contentions. Section 4 of the Partition Act provides :

4. Partition suit by transferee of share in dwelling house. -

(1) Where a share of a dwelling house belonging to an undivided family has been transferred to a person who is not a member of such family and such transferee sues

for partition, the court shall if any member of the family being a shareholder shall undertake to buy the shares of such transferee, make a valuation of such share in such manner as it thinks fit and direct the sale of such share to such shareholder and may give all necessary and proper directions in that behalf.

(2) If in any case described in sub-section (1) two or more members of the family being such shareholders severally under take to buy such share, the court shall follow the procedure prescribed by sub-section (2) of the last foregoing section.

9. On a plain reading of the provision of Section 4 it is clear and evident that when an application is made by co-sharer for buying up the share of the stranger purchaser in a dwelling house belonging to undivided family the court shall make valuation of such share in the manner it thinks just and proper and direct the sale of such share to shareholder and may give all necessary directions in that behalf. The object of Section 4 is to enable the members of a family to buy out a stranger transferee from one of the member, who seeks partition of dwelling house. Section 4 was enacted having in mind the consideration of corporate property existing as rule with special reference to joint property and social desire to preserve the unity of such property. It was also enacted with a view to maintain indivisibility and integrity of the property. We fail to see why this intention should not be given effect to in this case.

10. We have given our anxious consideration to the provisions of Section 4 of the Partition Act and we may state that the provisions of Section 4 do not create any bar for making a second application to buy the shares of a stranger purchaser provided at the time of making such application the property has not been divided by metes and bounds and the possession of the share of the stranger purchaser has not been delivered to him.

11. For the reasons aforesaid we allow the appeal, set aside the judgment and decree of the High Court and affirm the judgment and order of the learned Subordinate Judge. We however, direct that instead of producing the evidence by the parties the court will appoint a valuer for proper valuation of the property as on the date when the second application under Section 4 was made. The parties will be at liberty to produce evidence in respect of proper valuation of the property before the valuer. There will be no order as to costs.

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