

SUPREME COURT OF INDIA

Gyan Chand

Vs.

Sumat Rani

C.A.No.135 of 1991

(U.C.Banerjee and N. Santosh Hegde JJ.)

06.09.2001

ORDER

1. In a suit for partition in the Court of the V Additional District Judge, Jabalpur in C. S. No. 6A/82, the second defendant by way of an amended written statement purporting to base his claim under Section 4 of the Partition Act claimed the right of pre-emption available to a co-sharer in regard to certain portion of the property which is claimed to have been alienated in favour of defendants Nos. 13 and 14. The trial Court while granting the preliminary decree for partition, negative the said claim on the ground that the said right cannot be exercised by defendant No. 2 in a suit brought for partition by a co-sharer but the said right will be available to defendant No. 2 if a suit is brought for partition by the purchaser of the share in the joint family property.

2. On appeal, the High Court reversed the said finding and following the judgment of Gujarat High Court in *Gulamrasool Sarfuddin Malek and Others v. Dulhanbibi and Others*¹ and *Alekha Mantri v. Jagabandhu Mantri and Others*² held that defendant No. 2 is entitled to the relief based on the claim of pre-emption and remanded the matter to the trial Court to proceed further with the suit in accordance with law.

3. Being aggrieved by the said judgment of the High Court, the appellant has preferred this appeal. It is contended on behalf of the appellant that the view of the Full Bench of the Gujarat High Court as also that of the Orissa High Court followed by the High Court in the impugned judgment is no more a good law in view of the decision of this Court in the case of *Gautam Paul v. Debi Rani Paul and Others*³. This Court in the abovesaid case reversing the view taken by the Calcutta, Patna, Nagpur and Orissa High Courts has held that so long as the stranger purchaser does not seek actual division and possession either in the suit or in executing proceedings, a co-sharer cannot in a suit brought for partition by him or by another co-sharer exercise the right under Section 4 of the Partition Act. In other words, the said right of a co-sharer under Section 4 of the Partition Act will be available only if a transferee files a suit for partition. The law laid down by this Court supports the view taken by the trial Court and the High Court has fallen in error in taking a contrary view.

4. Mr. S. V. Deshpande, learned counsel representing the respondents, does not question the application of the law laid down in Gautam Paul's case (supra) to the facts of the case in hand. However, he contends that this Court in Gautam Paul's case has not taken into consideration the Full Bench judgment of the Gujarat High Court in the case of Sarfuddin Malek. Hence, it requires reconsideration. It is true that the Full Bench judgment of the Gujarat High Court (supra) is not cited before this Court in Gautam Paul's case (supra) but that cannot be a ground for us not to follow the said judgment which is of a co-ordinate bench of this Court. That apart, we are in respectful agreement with the law laid down by this Court in Gautam Paul's case. In the said view of the matter, this appeal is allowed and following the judgment in Gautam Paul's case (supra), we set aside the judgment of the High Court and restore that of the trial Court. No costs.

Appeal allowed.

¹(AIR 1980 Guj 110)

²(AIR 1971 Orissa 127)

³(2000 (8) SCC 330)